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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 138

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

GALBREATH CATTLE COMPANY AND ANNICE W. PHELPS AND FRANCES P. BELDEN, ETC., ET AL., ETC.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

[illegible]

PETITION FOR CERTIORARI FILED JULY 15, 1924

CERTIORARI GRANTED OCTOBER 20, 1924

[illegible]

(30,506)

(30,506)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 541

GREAT NORTHERN RAILWAY COMPANY, PETITIONER,

vs.

GALBREATH CATTLE COMPANY AND ANNICE W. PHELPS AND FRANCES P. BELDEN, ETC., ET AL., ETC.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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[fol. 1] IN THE

SUPREME COURT OF THE STATE OF MONTANA

L. G. PHELPS and GALBREATH CATTLE COMPANY, a Corporation,
Respondents,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant

Transcript on Appeal

Messrs. E. E. Enterline and J. S. Snellbacker, Counsel for Respondents.

Messrs. I. Parker Veazey, W. L. Clift, and R. H. Glover, Counsel for Appellants.

Appeal from the Thirteenth Judicial District of the State of Montana in and for the Coun- of Yellowstone

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

Cause No. 7369

L. G. PHELPS and GALBREATH CATTLE COMPANY, a Corporation,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT—Filed April 3, 1919

The plaintiffs above named complain of the defendant and for cause of action allege:

I. That L. G. Phelps, one of the plaintiffs in the above entitled action is now and was during all the times hereinafter mentioned, a citizen and resident of the State of Wyoming. That the Galbreath Cattle Company, the other plaintiff in the above entitled action is now and was during all the times hereinafter mentioned a corporation duly created, organized and existing under the laws of the State of Montana, and as such engaged in the livestock business in the State of Montana.

II. That the Chicago, Burlington & Quincy Railroad Company is now and was during all the times hereinafter mentioned a corporation duly created, organized and existing under and by virtue of the laws of the State of Illinois and as such engaged as a common [fol. 2] carrier of merchandise and livestock by rail. That its line of railroad extended from the town or station of Cody, in the State of Wyoming, in the direction of Seville, Montana, and together with that of its succeeding common carrier by rail, the defendant herein, formed a continuous and through line and route of connecting common carriers by rail between said Cody, in the State of Wyoming, and Seville, in the State of Montana.

III. That the defendant, Great Northern Railway Company is now, and was during all the times hereinafter mentioned a railway corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota and as such is and was the owner, in control of and engaged as a common carrier of merchandise and livestock by rail and in the business of operating an interstate railroad which extended and extends into, between and through the States of Minnesota, North Dakota and Montana. That during all the times hereinafter mentioned, the said defendant kept and maintained on its said line of railroad a station called Mossmain, in the County of Yellowstone, State of Montana. That at said station of Mossmain the line of railroad of the Chicago, Burlington & Quincy Railroad Company from Cody, in the State of Wyoming, connected with the line of railroad of the defendant which extended from said station of Mossmain to Seville, in the State of Montana.

IV. That on the 16th day of July, 1917, at said station of Cody, in the State of Wyoming, L. G. Phelps, one of the plaintiffs acting for the plaintiffs, delivered to the Chicago, Burlington & Quincy Railroad Company as such common carrier nine hundred eighty-four (984) head of cattle, the property of said plaintiffs, in good sound and healthy condition, which were loaded in thirty-two cars and billed and consigned for transportation over the line of railroad of the said Chicago, Burlington & Quincy Railroad and said connecting carrier the defendant herein, to said Seville, in the State of Montana, there to be delivered to the Galbreath Cattle Company, one of the plaintiffs herein. That the said Chicago, Burlington & Quincy Railroad Company as such common carrier on the said 16th day of July, 1917, at said station of Cody, in the State of Wyoming, received and accepted said cattle as such common carrier and for a valuable consideration thereafter to be paid, executed and issued to L. G. Phelps, one of the plaintiffs, its certain through bill of lading, shipping contract or receipt which provided for the transportation of said cattle by the said Chicago, Burlington & Quincy Railroad Company over its line of railroad and that of its succeeding and connecting common carrier, the defendant herein, to Seville, in the State of Montana, promptly, with due care and within a reasonable time, there to be delivered to the Galbreath Cattle Company, one of the plaintiffs herein.

V. That while the said original bill of lading, shipping contract or receipt was issued to L. G. Phelps, the same was issued for the benefit of these plaintiffs and that these plaintiffs ever since the [fol. 3] issuance thereof have been and now are the sole and lawful owners and holders thereof, and were, have been and are lawfully entitled to own and hold the same.

VI. That the said Chicago, Burlington & Quincy Railroad Company did promptly transport said train of cattle over its line of railroad and did within, reasonable time after receiving the same from the plaintiff, to-wit: seven hours, deliver the same in good, sound and healthy condition to its connecting common carrier, the defendant herein, at the said station of Mossmain, in the State of Montana.

VII. That when said train of cattle arrived at said station of Mossmain the weather was extremely hot and sultry and that said defendant was advised by plaintiffs and then well knew or by the exercise of ordinary — could have known that unless the said train of cattle was kept moving there was great danger of the cattle becoming over-heated and that loss of and injury to the same would result therefrom. That notwithstanding the said defendant well knew of the extremely hot and sultry weather then existing, and then knew or by the exercise or ordinary care could have known that loss of and injury to the cattle would result if the said train of cattle was not kept in motion, the said defendant carelessly and negligently left the said train of cattle stand on the tracks at said station of Mossmain in such extremely hot and sultry weather for a period of about, to wit: seven hours before the same was put in motion. That after the train in which said cattle were being transported had passed a station called Judith Gap on the defendant's said line of railroad, the defendant carelessly and negligently stopped its said train and left it standing for several hours, while the weather was still extremely hot and sultry, in a hot and suffocating gravel pit or deep cut on its said line of railroad. That by reason of said unreasonable delays and that by reason of said train being left stand-and not kept in motion as aforesaid, the said cattle became overheated, sick, feverish and prostrated.

VIII. That said defendant did not use reasonable or ordinary care in and about the handling, care and transportation of the said cattle while the same were actually in transit over its railroad, in its possession and under its control as such common carrier, but that the said defendant on the contrary from time to time on several occasions wrongfully, negligently and carelessly started and stopped the train in which said cattle were being transported with great and unnecessary suddenness and voilence, thereby throwing said cattle from their feet to the floor of the cars and piling them one upon another in the ends of the cars.

IX. That when the said train of cattle arrived at Great Falls, in the State of Montana, on the said defendant's line of railroad, and while they were in an overheated, sick, feverish and prostrated condition, the said defendant, wrongfully, carelessly and negligently showered the said cattle with cold water through a hose, thereby in-
[fol. 4] juring shocking and paralyzing a great number thereof.

That instead of unloading and handling said cattle at said station of Great Falls quietly and without delay as it should have done in the exercise of ordinary care, the said defendant wrongfully, carelessly and negligently kept said cattle confined in said cars for a number of hours, and in unloading, loading and handling said cattle at said station wrongfully, negligently and carelessly prodded and clubbed a number of said cattle, thereby injuring a number *of* thereof.

X. That the said defendant did not transport the said cattle to said destination promptly nor within a reasonable time, but on the contrary wrongfully, carelessly and negligently delayed the transportation and delivery thereof to the Galbreath Cattle Company, one of the plaintiffs, at said station of Seville, in the State of Montana for the period of upwards of four full days beyond the lapse of a reasonable time of such transportation and delivery, so that the cattle instead of arriving at said destination as they should and would have arrived had they been transported by said defendant promptly and within a reasonable time, on the 18th day of July, 1917, did not in fact arrive at said destination until the 22d day of July, 1917.

XI. That by reason and on account of the negligently slow run and negligent delay in the transportation of said cattle between stations of Mossmain and Great Falls and at said station of Mossmain and at or near the station of Judith Gap, it became and was necessary to unload said cattle to be fed, watered, rested and cared for at said station of Great Falls, Montana, while it would not have been necessary to have unloaded said cattle to be fed, watered, rested and cared for at said station had said defendant transported said cattle over its said line and route with reasonable promptness and within a reasonable time. That the said defendant wrongfully, carelessly and negligently failed and omitted to afford the plaintiffs reasonable means or opportunity for unloading, feeding, watering and resting said cattle at its said station of Great Falls, where the same were unloaded for such purpose and to be cared for as aforesaid, and negligently and carelessly failed and omitted to unload the same at said station of Great Falls in a humane manner into properly equipped pens for rest, feed and water.

XII. That by reason of the facts and premises aforesaid and by reason of each and all of the acts of negligence hereinbefore complained of, the said cattle while in the possession and under the control of said defendant became overheated, bruised, shrunken, gaunted and emaciated and rendered sick, feverish and of stale and unmarketable appearance and condition, lowered in grade, quality and selling and market value, greatly reduced and lessened in weight and seriously injured and damaged and one hundred forty-nine (149) head thereof were killed and died in transit.

XIII. That by reason of the negligence of said defendant in the run and delay aforesaid at and between the stations of Mossmain and [fol. 5] Great Falls, the said plaintiffs were obliged to lay out and expend for necessary feed and care of said cattle while being held at said station of Great Falls the sum of Nine Hundred Twenty Nine ($929.00) Dollars and that the said services and feed were reasonably worth the sum of Nine Hundred Twenty Nine ($929) Dollars.

XIV. That by reason of the facts and premises aforesaid the plaintiffs have been damaged in the sum of Forty-five Thousand Six Hundred Thirty-three ($45,633.00) Dollars.

Wherefore, the said plaintiffs pray judgment:

That they do have and recover of and from the said defendant the sum of Forty Five Thousand Six Hundred Thirty Three ($45,633.00) Dollars together with their costs and disbursements herein incurred.

E. E. Enterline, Attorney for Plaintiffs.

[File endorsement omitted.]

IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

NOTICE OF PETITION AND BOND FOR REMOVAL

To the plaintiffs in the above-entitled cause and to E. E. Enterline, Esquire, their attorney:

Pursuant to the provisions of the Act of Congress of the United States to codify, revise and amend the laws relating to the Judiciary, you are hereby given written notice of the petition and bond for removal in the above entitled cause (copies of which said petition and bond are hereto attached) prior to the filing of the same, and you are hereby further notified that said petition and bond will be forthwith filed in the above entitled Court and presented to said court for approval and acceptance, and that said Great Northern Railway Company will forthwith ask said Court for the relief in said petition prayed, and that on Friday, the 25th day of April, 1919, at 10 o'clock, A. M. on said day, or as soon thereafter as counsel can be heard, at the Court House of the above entitled court, in the City of Billings, in the County aforesaid, or if the Court is not there in session, then wherever the said Court may be in session, said Great Northern Railway Company will, if said relief shall not then have been granted, again ask the Court for an order granting the relief in said petition prayed, for the reasons and upon the grounds set forth in said petition and the papers and files therein referred to.

Dated this 23rd day of April, 1919.

Veazey & Veazey and W. L. Clift, Attorneys for Great Northern Railway Company, petitioner.

[fol. 6] IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

PETITION FOR REMOVAL

To the Honorable the District Court above named:

The petition of Great Northern Railway Company, above named, respectively shows unto this honorable Court:

1. That the above entitled cause is a suit of a civil nature at law where the matter in controversy, in said cause, exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars, and (a) arises under the constitution or laws of the United States or treaties made, or which have been made, under their authority, or (b) is between citizen or different states, or (c) is between a citizen or citizens of a state and foreign states, citizens or subjects, and said suit really and substantially involves a dispute or controversy properly within the jurisdiction of the District Court of the United States, in and for the District of Montana, and said case is not alleged to arise and as alleged, does not arise under an Act of the Congress of the United States approved April twenty-second, nineteen hundred and eight or any amendment thereto.

2. That, at the time of the commencement of the above-entitled cause, your petitioner was, ever since has been, and still now is, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and a citizen and resident of the State of Minnesota, and not a citizen or resident of the State of Montana, or a resident of the District of Montana. That, at the time of the commencement of the above entitled cause * * * plaintiff Galbreath Cattle Co. was, ever since has been, and still now is, a citizen of the State of Montana and a resident of the State and of the District of Montana, and not a citizen or resident of the State of Minnesota, and the plaintiff Phelps, was, ever since has been and still now is a citizen and resident of the State of Wyoming, and not of the State of Montana or Minnesota.

3. Your petitioner makes and files this petition, duly verified, in said suit in the above entitled Court, before your petitioner, as a defendant therein, is required by the laws of the State of Montana, or by any rule or rules of the above entitled Court, in which said suit was brought and is pending, to answer or plead to the complaint of the plaintiffs therein.

4. Your petitioner makes and files herewith a bond, with good and sufficient surety, for its entering in the District Court of the United States, in and for the District of Montana, within thirty days from the date of the filing of this petition in the above entitled court, a certified copy of the record in this suit and for its paying all the costs that may be awarded by said District Court of the United States [fol. 7] if said District Court of the United States shall hold that this suit was wrongfully or improperly removed thereto.

5. Your petitioner further avers that written notice of this petition and of said bond for removal has been given the adverse parties, to-wit, the said plaintiffs, prior to the filing thereof and that, prior to the filing of said petition and bond, your petitioner duly served upon the attorney for the said adverse parties, a written notice of your petitioner's intention to file and present this petition and said bond to the above entitled court and to ask the above entitled court for the relief herein prayed; all of which more fully appears from (1) the written admission of the plaintiff, or of their attorney, of the service of said notice endorsed upon said petition and bond, or accompanying this petition, or, by (2) the affidavit accompanying this petition.

6. That the nature of this action and of each and every controversy asserted by the plaintiff therein is particularly set forth in the complaint on file herein, to which reference is hereby made and by this reference said complaint is made a part of this petition as fully and to all intents and purposes as if here set out at length to show the nature of this action and of each and every controversy asserted by the plaintiff.

It appears from said complaint that this action is brought to recover damages in the sum of Thirty-five Thousand Six Hundred Thirty-three Dollars ($35,633.00) by reason of the alleged delay and improper handling of a certain interstate shipment of cattle made from Cody, Wyoming, a station on the line of railway of Chicago, Burlington & Quincy Railroad Company, to Seville, Montana, a station on the defendant's line of railway, during the month of July, 1917, and that said shipment moved in interstate commerce and was and is governed by the provisions of various Federal Acts and not by any statutes of Montana.

Your petitioner, therefore, prays this Honorable Court to proceed no further in this suit except to accept this petition and said bond and to cause a certified copy of the record herein to be removed to said District Court of the United States, in and for the District of Montana, within thirty days from the date of the filing of this petition; and, upon said prayer being granted and only as ancillary to the removal of said cause as prayed, your petitioner further prays that (pursuant to the Act of the Congress of the United States to codify, revise, and amend the laws relating to the Judiciary) the time within which the said petitioner Great Northern Railway Company may plead, answer or demur to the complaint in this cause be extended to and including thirty days after the said certified copy of the record shall have been filed in said District Court of the United States, within said thirty days as aforesaid; and that said defendant be permitted, within the time extended as aforesaid, to plead, answer or demur, in said District Court of the United States, for the District of Montana, to the complaint of plaintiffs in said cause and to pro- [fol. 8] ceed with said cause in said District Court of the United

States in the same manner as if said cause had been originally commenced in said District Court of the United States.

And your petitioner will ever pray.

Veazey & Veazey and W. L. Clift, Attorneys for Petitioner,
Great Northern Railway Company.

Affidavit of W. L. Clift to above paper omitted in printing.

(Title of Court and Case)

REMOVAL BOND FOR COSTS FOR $300—Omitted in printing

(Title of Court and Case)

AFFIDAVIT OF SERVICE—Omitted in printing

IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

ORDER DENYING PETITION FOR REMOVAL—Filed Aug. 14, 1919

This cause coming on this day, regularly, further to be heard, and it appearing to the Court that the defendant herein did make and file a petition, duly vertified, in the above entitled Court and cause, before said defenadnt was required by the laws of the State of Montana, or any rule of the above entitled Court, to answer or plead to the complaint of the plaintiff, for the removal of said suit to the District Court of the United States for the District of Montana, and that the said defendant did make and file with said petition a bond with good and sufficient surety for said defendant entering in said District Court of the United States, within thirty days from the date of the filing of said petition, a certified copy of the record in said suit and for paying all costs that might be awarded against it if said District Court of the United States should hold that said suit was wrongfully or improperly removed thereto; and it further appearing that written notice of said petition and bond for removal was given the adverse party, to-wit, the plaintiffs, prior to filing the same; and it further appearing to the Court that the defendant has done all things necessary or proper to obtain a removal of said cause, as in said petition prayed, if defendant is in law entitled to a removal thereof; but it further appearing to the Court—from the complaint herein, that there is no federal question involved in the action, and no diversity of citizenship among the parties such as would permit [fol. 9] of the cause being brought originally in a Federal Court.

It is, therefore, ordered, adjudged and decreed, That said petition be, and the same hereby is, denied, and that said defendant be, and hereby is, denied a right to have said cause removed to the United

States District Court aforesaid; to which ruling of the Court the defendant, then and there, duly excepted.

Done in open Court this 13th day of August, 1919, and ordered entered as above.

Chas. A. Taylor, Judge.

[File endorsement omitted.]

In District Court for Yellowstone County

(Title of Court and Case)

Demurrer—Filed April 25, 1919

Comes now the defendant in the above entitled cause of action, by Veazey & Veazey and W. L. Clift, its attorneys, but without waiving its petition heretofore filed in said matter for removal of said cause to the Federal Court, and demurs to the complaint filed herein, for the reason that the same fails to state facts sufficient to constitute a cause of action.

Veazey & Veazey and W. L. Clift, Attorneys for Defendant.

[File endorsement omitted.]

In District Court for Yellowstone County

(Title of Court and Case)

Answer—Filed Oct. 15, 1919

Comes now the defendant in the above entitled cause and for its answer to the complaint of the plaintiff on file herein, says:

1. Save as hereinafter specifically admitted, or denied, this defendant denies each and every allegation, matter and thing in plaintiff's complaint contained.

2. This defendant admits the allegations of paragraph I of said complaint, and that at all times stated in the complaint prior to the 1st day of January, 1918, the Chicago, Burlington & Quincy Railroad Company was a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and as such engaged as a common carrier of live-stock by rail, and that its railroad extended from the station of Cody, Wyoming in the direction of Seville, Montana; and that at all of said times, this defendant was a [fol. 10] corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, and as such was the owner and operator, as a common carrier of live-stock by rail of an interstate rail-

road extending through the states of Minnesota, North Dakota, and Montana, and that during said times it kept and maintained a station called Mossmain in the county of Yellowstone, in the state of Montana; that on said first day of January, 1918, this defendant's properties were taken possession of by the United States of America, and since said first day of January, 1918, this defendant has not operated any of said properties or been engaged in the business of a common carrier; that at the time of the filing of the complaint herein, and at all times stated in, the complaint, this defendant was a corporation.

3. This defendant admits that on the 16th day of July, 1917, at the station of Cody in the state of Wyoming, L. G. Phelps, one of the plaintiffs delivered to said Burlington Railroad Company, as such common carrier more than nine hundred, forty-eight (948) head of cattle which were thereupon loaded by said Phelps in thirty-two (32) cars and billed and consigned for transportation over the line of railroad of said Burlington Railroad to be carried by it to Mossmain, Montana, and ultimately to be carried to Seville, there to be delivered to the plaintiff Galbreath Cattle Company. Defendant denies that at the time said animals were delivered to said Burlington Railroad, the same were in good, sound, healthy condition for shipping. Defendant further admits that thereupon the said Burlington Company at said station of Cody, on said 16th day of July, 1917, received and accepted said cattle as such common carrier and for a valuable consideration, executed and issued to said Phelps, its said bill of lading and live-stock shipping contract, providing for the transportation of said cattle by said Burlington Railroad Company over its line and providing that the terms thereof should enure to the benefit of any carrier constituting a part of a through line of railroad and providing for the transportation and delivery of said cattle from said Cody, Wyoming to said Galbreath Cattle Company at Seville, Montana with due care and within a reasonable time.

4. Defendant further says that said bill of lading and live-stock shipping contract was duly executed by said Burlington Railroad Company and said L. G. Phelps as shipper and delivered by the one to the other, providing the terms upon which the said live-stock should be transported; that under and by the terms of said contract, it was provided that the shipper did declare the value of each steer in said shipment to be seventy-five ($75.00) dollars, and in and by the terms of said contract it was agreed that the said cars and the animals contained therein should be in the sole charge of such person or persons designated by the shipper who might accompany the same for the purpose of attention to and care of said animals in transit and that said animals should be loaded, unloaded, watered and fed by the shipper or by his agents in charge, and in and by the terms of said contract, it was provided that the carrier should not [fol. 11] be obligated to transport said animals otherwise than with reasonable dispatch.

5. Defendant further says that after the transportation of said animals by said Burlington Railroad Company to said station, Mossmain, Montana, said thirty-two cars containing said animals were thereupon delivered by said company to this defendant for transportation from said Mossmain, Montana to said Galbreath Cattle Company at Seville, Montana, and thereupon, at the time of the delivery of said live-stock to this defendant, a new contract was entered into, executed and delivered by this defendant to said Phelps, as shipper, and by said Phelps to this defendant, providing for the transportation of said live stock over the line of this defendant from said Mossmain, Montana, to said Galbreath Cattle Company at said Seville, Montana, in and by which said contract, the said shipper agreed that the value of each steer in said shipment was seventy-five ($75.00) dollars, and that this defendant, as carrier, should not be liable for loss or death or injuries to any of said stock unless the same should be caused by the sole negligence of this defendant, its servants, agents and employees, and in and by the terms of said contract, it was provided that the shipper should load, unload, and reload, said stock at his own expense and risk, and feed, water and tend to the same at his own expense and risk while in the stock-yards of this defendant awaiting shipment or while in cars or at feeding or transfer points, or where the same might be unloaded for any purpose, and in and by the terms of said contract, it was provided that the shipper assumed the duty of properly securing and placing all of said stock in said cars;

6. Further answering, this defendant admits the allegations of paragraph VI of said complaint. Further answering, this defendant admits that after the said train was set out by said Chicago, Burlington & Quincy Railroad Company at said station of Mossmain, the same was not moved by this defendant therefrom until about five or six hours thereafter, and thereafter this defendant continued the transportation of said live-stock from said Mossmain to Great Falls, Montana, and continued the transportation of said animals as aforesaid with reasonable diligence and at reasonable speed under all the circumstances. Defendant admits that after said train left Mossmain until the same arrived at Great Falls, Montana, the weather was extremely hot, and that said cattle by reason of said hot weather and the facts herein set forth became over-heated, prostrated and sick, and that one hundred forty-two (142) head thereof died at Great Falls, Montana, either at the time of the arrival of said train there or within a few days thereafter, but defendant denies that the death of said animals or any injury to said animals was due to or caused by any negligence on the part of this defendant, but on the contrary, alleges that it was due to and caused by the acts and omissions of the shipper as hereinafter set forth.

7. Defendant further says that said animals at the time they were delivered to said Chicago, Burlington & Quincy Railroad Company [fol. 12] and to this defendant for transportation were not in good shipping condition and the said shipper so negligently failed to water said animals such a long and unreasonable length of time prior

to the loading thereof upon the cars, and so negligently drove said animals and milled the same for several days prior to the loading thereof, and so negligently loaded and overloaded said animals in said cars at said Cody, Wyoming, and so negligently failed to give said cattle attention when they first showed signs of becoming weak, and so negligently failed adequately to care for said animals in transit and so negligently dispatched but one caretaker in charge of said live-stock who could not, by reason of the size of the shipment and otherwise, adequately care for the same in transit, that the cattle became prostrated by the heat and by lack of water and became sick so that one hundred, forty-two (142) head thereof became damaged to such an extent that they died on the arrival of said shipment at Great Falls or within a few days thereafter.

II. For a second separate defense to said complaint, this answering defendant says:

1. That plaintiffs' damage, if any, was due to and caused by the contributing fault and carelessness of the shipper, his agents, servants, and employees, and to his and their negligent failure, at all times stated in the complaint, to exercise, for the safety of said animals, such reasonable care and caution as the average reasonably prudent person would, could and should, and ordinarily would have exercised, under all of the circumstances as herein set out and otherwise; that the shipper, his agents, servants and employees, delivered said animals to said Chicago, Burlington and Quincy Railroad Company at Cody, Wyoming, and thereafter to this defendant, for transportation, when they were not in a good shipping condition; that said shipper, his agents, servants, and employees, so negligently loaded said animals upon the cars at said Cody, Wyoming, when they were not in good shipping condition, and so negligently failed to water said animals such a long and unreasonable length of time prior to the loading thereof upon the said cars, and so negligently drove said animals and milled the same for several days prior to the loading thereof, and so negligently loaded and overloaded said animals in said cars at said Cody, Wyoming, and so negligently failed to give said cattle attention when they first showed signs of becoming weak, and so negligently failed adequately to care for said animals in transit, and so negligently dispatched but one cartaker in charge of said livestock, who could not, by reason of the size of said shipment, and otherwise, adequately care for the same in tranist, that said cattle became prostrated by heat and lack of water, and became sick, so that 142 head thereof became damaged to such an extent that they died on the arrival of said shipment at Great Falls, or within a few days thereafter; that the death of said animals, and plaintiffs' damage if any, beyond the death of said animals, was proximately due to and caused [fol. 13] by the negligence of the shipper, his agents, servants and employees, as herein set out, and otherwise, and to said shipper, his agents, servants, and employees, having negligently loaded said animals on the cars when they were not in sufficient shipping con-

dition to stand ordinary shipping from said Cody, Wyoming to Great Falls or Seville, Montana, and to his negligent failure properly to care for and attend to them in the transit aforesaid.

III. For a third separate answer to said complaint, and by way of counterclaim, this answering defendant says:

1. That at all of the times herein stated this defendant was, and still now is, a corporation, duly organized and existing under and by virtue of the laws of the State of Minnesota, and throughout the year 1917, as such corporation, was a common carrier of freight, including livestock, by railroad, from Mossmain, Montana to Seville, Montana.

2. That on or about the 16th day of July, 1917, L. G. Phelps, one of the plaintiffs in the above entitled cause, delivered to Chicago, Burlington and Quincy Railroad Company, at Cody, Wyoming, the cattle referred to in the complaint herein, for transportation by said Burlington Company from said Cody, Wyoming, towards said Seville, Montana, and for transportation by this defendant from Mossmain, Montana to Seville, Montana; that at the time said cattle were delivered, as aforesaid, a contract was entered into by and between the said Burlington Company, for its own use and for the benefit of any succeeding carrier transporting said animals, and the shipper, in and by which it was agreed between the shipper and the said Burlington Company that the said cars, and the animals contained therein, should be in the sole charge of such person or persons designated by the shipper, who might accompany the same for the purpose of tending to and caring for said animals in transit, and that said animals should be loaded, unloaded, watered and fed by the shipper, or by his agents in charge; and that at said Mossmain, Montana, at the time of the delivery of said animals to this defendant, a new contract was entered into between the said shipper and this defendant, in and by which it was agreed that the shipper would load, unload and reload said stock at his own expense and risk, and feed, water, and tend to the same at his own expense and risk, while in the stockyards of this defendant awaiting shipment or while in cars or at feeding or transfer points, or where the same might be unloaded for any purpose; and in and by the terms of said contract it was provided that the shipper assumed the duty of properly securing and placing of all said stock in said cars.

3. Defendant further says that, at the time said shipper delivered said stock to said Burlington Railroad Company, they were not in good shipping condition, and the said shipper so negligently delivered said animals to said Burlington Company, for transportation by said [fol. 14] Burlington Company and by this defendant, as aforesaid, while they were not in good shipping condition, and so negligently failed to water said animals such a long and unreasonable length of time prior to the loading thereof upon the cars, and so negligently drove said animals and milled the same for several days prior to the

loading thereof, and so negligently loaded and overloaded said animals in said cars at said Cody, Wyoming, and so negligently failed to give said cattle attention after they left said Cody, Woyming, in the transit, aforesaid, when they first showed signs of becoming weak, and so negligently failed adequately to care for said animals in the transit aforesaid, and so negligently despatched but one caretaker with said animals, who could not, by reason of the size of said shipment, and otherwise, adequately care for the same in transit, that said cattle became prostrated by heat and lack of water, and became sick, so that 142 head thereof became damaged to such an extent that they died on the arrival of said shipment at Great Falls, or within a few days thereafter, and it was necessary to detain said shipment in Great Falls for several days, all of which was caused by the condition of said animals at the time they were loaded on the cars at Cody, Wyoming, and by the acts, aforesaid, of said shipper; all of which the said shipper, in the exercise of reasonable care, would have known, and in fact actually well knew.

4. That, by reason of the premises, at said Great Falls, Montana, the defendant was compelled to expend the sum of $914.20 in and about the disposition of and burying of the carcasses of said animals that died, as aforesaid; and the sum of $476.55 for the care of said animals on their arrival at Great Falls, Montana, and while they were being necessarily detained at said Great Falls, Montana, by reason of the premises; and the sum of $500.00 in other and miscellaneous expenses at said Great Falls, Montana, in the care of said animals, all of which expenses were reasonable and represented the reasonable value of the services rendered for said sums, and made necessary by reason of the condition of said animals, as aforesaid, and the acts of the said shipper.

Wherefore, having fully answered, this defendant prays:

1. That the plaintiffs take nothing by this action, and that the complaint of the plaintiffs be dismissed, and that this defendant go hence, without day, with its costs and disbursements herein.

2. That this defendant have judgment against the plaintiffs in the sum of $1,890.75, as a counterclaim, as expenses incurred by it as hereinbefore set forth.

W. L. Clift, Veazey & Veazey, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 15] IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

REPLY—Filed Nov. 1, 1919

Come now the plaintiffs in the above entitled action and make and file this their reply to the answer of the defendant herein made and filed and replying to the first defense set forth in the said defendant's answer allege:

I. That they deny each and every allegation set forth in the said first defense of defendant's answer save and except as hereinafter specifically admitted and save and except such allegations which admit certain allegations of plaintiffs' complaint.

II. That the cattle shipped under the bill of lading and livestock shipping contract mentioned in the plaintiffs' complaint and in the said first defense of the defendant's answer were ordinary livestock and were so declared to be in the said bill of lading and livestock shipping contract.

III. That they admit that while the said train of cattle was en route from Mossmain to Great Falls, Montana, the weather was extremely hot.

IV. That the said defendant did not at the times mentioned in the complaint or in the answer of the defendant have or maintain at the said station of Mossmain or along its line of railroad from said station of Mossmain to the station of Seville, in the State of Montana, reasonable or adequate facilities or properly equipped pens for resting, watering and feeding said cattle, and caring for the same.

V. That when said train of cattle arrived at Judith Gap, a station on defendant's line of railroad between Mossmain and Great Falls, the cattle were suffering with the heat and a large number thereof were prostrated by reason of certain acts of negligence complained of in plaintiffs' complaint herein. That the defendant, its agents and employees in direction and in charge of said train of cattle were thereupon advised by the person in custody of said shipment, and that they then well knew, of the condition of said cattle and the reasons therefor. That the defendant, its said agents and employees thereupon advised the person in custody of said shipment of cattle that there were no reasonable or adequate facilities or properly equipped pen*ds* to unload said cattle for rest, care and attention at said station of Judith Gap, and that said shipment of cattle would be rushed to Great Falls, where reasonable and adequate facilities and properly equipped pens could be had for resting, handling, watering, feeding, treating and caring for said cattle. That as hereinbefore and in plaintiffs' complaint alleged, no such reasonable and adequate facilities or properly equipped pens for resting, handling, watering, feeding, treating and caring for said cattle were had, furnished or maintained by said defendant at said station of Great Falls, [fol. 16] nor was the said train of cattle run with reasonable dispatch from Judith Gap to Great Falls.

And the said plaintiffs further replying to the answer of the defendant herein made and filed and to the second separate defense to plaintiffs' complaint in said answer set forth, allege:

I. That they deny each and every allegation in said second separate defense of the defendant's answer.

II. That the said defendant did not at the times mentioned in the complaint or in the answer of the defendant have or maintain at the said station of Mossmain or along its line of railroad from said station of Mossmain to the station of Seville, in the State of Montana, reasonable or adequate facilities or properly equipped pens for resting, watering and feeding of said cattle, and caring for the same.

III. That when said train of cattle arrived at Judith Gap, a station on defendant's line of railroad between Mossmain and Great Falls, the cattle were suffering with the heat and a large number thereof were prostrated by reason of certain acts of negligence complained of in plaintiffs' — herein. That the defendant, its agents and employees in direction and in charge of said train of cattle, were thereupon advised by the person in custody of said shipment, and that they then well knew, of the condition of said cattle and the reasons therefor. That the defendant, its said agents and employees thereupon advised the said person in custody of said shipment of cattle that there were no reasonable or adequate facilities or properly equipped pens to unload said cattle for rest, care and attention at said station of Judith Gap, and that said shipment of cattle would be rushed to Great Falls, where reasonable and adequate facilities and properly equipped pens could be had for resting, handling, watering, feeding, treating and caring for said cattle. That as hereinbefore and in the plaintiffs' complaint alleged, no such reasonable and adequate facilities or properly equipped pens, for resting, handling, watering, feeding, treating and caring for said cattle were had, furnished or maintained by said defendant at said station of Great Falls, nor was the said train of cattle run with reasonable dispatch from Judith Gap to Great Falls.

And the said plaintiffs further replying to the answer of the defendant herein made and filed and to the third separate answer or defense and counter-claim in said answer set forth, allege:

I. That they deny each and every allegation in said third separate answer or defense and counter-claim save and except as hereinafter specifically admitted.

II. That they admit that the defendant was at all the times stated in the said third separate defense and counter-claim and now is duly organized and existing under and by virtue of the laws of the State of Minnesota and a common carrier of freight, including livestock by railroad.

[fol. 17] III. That they admit and aver that on or about the 16th day of July, 1917, L. G. Phelps, one of the plaintiffs, acting for the plaintiffs, delivered to the Chicago, Burlington & Quincy Railroad Company, at Cody, Wyoming, the cattle mentioned in the complaint for transportation billed and consigned as alleged in the complaint for transportation over the line of railroad of the said Chicago, Burlington & Quincy Railroad Company, and its connecting carrier the defendant herein, to Seville, in the State of Montana.

IV. That the said defendant did not at the times mentioned in the complaint or in the answer of the defendant have or maintain at the said station of Mossmain or along its line of railroad from said station of Mossmain to the station of Seville, in the State of Montana, reasonable or adequate facilities or properly equipped pens for resting, watering and feeding of said cattle, and caring for the same.

V. That when said train of cattle arrived at Judith Gap, a station on defendant's line of railroad between Mossmain and Great Falls, the cattle were suffering with the heat and a large number thereof were prostrated by reason of certain acts of negligence complained of in plaintiff's complaint herein. That the defendant, its agents and employees in direction and in charge of said train of cattle, were thereupon advised by the person in custody of said shipment, and that they then well knew, of the condition of said cattle and the reasons therefor. That the defendant, its said agents and employees thereupon advised the said person in custody of said shipment of cattle that there were no reasonable or adequate facilities or properly equipped pens to unload said cattle for rest, care and attention at said station of Judith Gap, and that said shipment of cattle would be rushed to Great Falls, where reasonable and adequate facilities and properly aquipped pens could be had for resting, handling, watering, feeding, treating and caring for said cattle. That as hereinbefore and in the plaintiffs' complaint alleged, no such reasonable and adequate facilities or properly equipped pens for resting handling, watering, feeding, treating and caring for said cattle were had, furnished or maintained by said defendant at said station of Great Falls, nor was the said train of cattle run with reasonable dispatch from Judith Gap to Great Falls.

VI. That on or about the 21st day of July, 1917, the defendant presented the plaintiffs its bill for feeding, watering and handling said cattle at Great Falls, which bill was then fully paid by plaintiffs.

And the said plaintiffs further replying to the answer of the defendant herein made and filed allege:

That they deny and every allegation in said answer contained save and except as hereinbefore specifically admitted.

Wherefore, the said plaintiffs pray judgment as prayed for in their complaint herein.

E. E. Enterline, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 18] IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

VERDICT—Filed Dec. 15, 1920

We, the jury duly impaneled and sworn in the above entitled cause do find the issues generally for the plaintiffs and do assess their damages in the sum of Twenty Thousand Six hundred eighty-five & 90/100 Dollars, in the sum of—as above (Interest included) Dollars, and we do assess plaintiffs total damages in the sum of—as above $20,685.90 Dollars.

Edward G. Bragg, Foreman.

[File endorsement omitted.]

IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

JUDGMENT—Filed Dec. 17, 1920

The above cause came on regularly to be heard on the 10th day of December, 1920, on issue joined on the pleadings herein, before the Honorable A. C. Spencer, Judge of the said Court, whereupon a jury was duly empan*n*eled and sworn to try the issues in the said cause, and thereupon the trial of the cause was proceeded with, and the same was continued from day to day and heard on the 11th, 13th, 14th and 15th days of December, 1920, evidence of witnesses was heard and on the 15th day of December, 1920, both parties having concluded the introduction of evidence, the Court having charged the jury, arguments of counsel were heard, and thereupon and on the 15th day of December, 1920, the said cause was submitted to the jury for its said verdict, whereupon the jury retired in charge of sworn bailiffs to deliberate on its verdict, and thereafter and on the 15th day of December, 1920, the jury returned into Court the verdict in said cause, which omitting the title of the Court and cause is in the words and figures following, to-wit:

"(Title of Court and Cause)

We, the jury duly empaneled and sworn in the above entitle cause do find the issues generally for the plaintiffs and do assess their damages in the sum of Twenty Thousand Six Hundred Eighty-five and 90/100 ($20,685.90) Dollars in the sum of as above (interest included) Dollars and we do assess plaintiffs' total damages in the sum of as above $20,685.90 Dollars.

Edward G. Bragg, Foreman."

[fol. 19] Now therefore, in consideration of the law and the premises it is by the Court considered and adjudged as follows:

That the said L. G. Phelps and Galbreath Cattle Company, a corporation, plaintiffs in the above entitled action do have and recover of and from the said defendant, Great Northern Railway Company, a corporation, the sum of Twenty Thousand Six Hundred Eighty-five and 90/100 ($20,685.90) Dollars together with their costs and disbursements herein taxed at — ($—), for which execution is hereby awarded.

Done in open court this 17th day of December, 1920.

A. C. Spencer, Judge.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

No. 7369

[Title omitted]

CLERK'S CERTIFICATE TO JUDGMENT ROLL

I, the undersigned, Clerk of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, which has been recorded in Judgment Book No. 9 of said Court, at Page 328. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of said Court, this 17th day of December A. D. 1920.

Fred Quabnit, Clerk. (Seal.)

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

[Title omitted]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL—Filed Dec. 22, 1920

To the plaintiffs in the above entitled cause and to Messrs. E. E. Enterline and J. W. Snellbacher, as attorneys for the plaintiffs:

You and each of you will please take notice: That (having first received notice of the entry of judgment herein by a written notice served upon this defendant on the 18th day of December, 1920, [fol. 20] wherein and whereby said defendant was advised, and was first advised, and given notice that judgment had been entered in the above entitled cause on the 17th day of December, 1920), the defendant, as the party aggrieved, intends to move the Court to vacate and set aside the verdict of the jury herein and to grant a new trial of the above entitled cause, upon the following grounds, which are grounds materially affecting the substantial rights of said defendant, to-wit:

1. Irregularity in the proceedings of the Court, jury and adverse party, by which said defendant was prevented from having a fair trial of said cause.

2. Orders of the Court and abuse of discretion, by which the said defendant was prevented from having a fair trial of said cause.

3. Misconduct of the jury.

4. Accident or surprise which ordinary *produce* could not have guarded against.

5. Newly discovered evidence, material for the said defendant, which said defendant could not, with reasonable diligence, have discovered and produced at the trial.

6. Excessive damages appearing to have been given under the influence of passion and prejudice.

7. Insufficiency of the evidence to justify the verdict.

8. Insufficiency of the evidence to justify the decisions of the Court, adverse to said defendant in the course of the trial.

9. That the verdict is against the law.

10. Errors in law occuring at the trial and excepted to by said defendant.

Said motion for a new trial will be made upon a Bill of Exceptions hereafter to be served, settled, and filed, and upon affidavits hereafter to be served and filed, and upon the minutes of the Court.

I. Parker Veazey, Jr., W. L. Clift, & R. H. Glover, Attorneys for Defendant.

Indorsed: Due service of the within Notice this 22nd day of Dec. 1920 is hereby admitted. E. E. Enterline and J. W. Snellbacher, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 21] IN DISTRICT COURT FOR YELLOWSTONE COUNTY

(Title of Court and Case)

DEFENDANT'S BILL OF EXCEPTIONS—Filed July 15, 1921

Be it remembered, That this cause came on regularly for trial on the tenth day of December, 1920, before Honorable A. C. Spencer, one of the Judges of the above entitled Courts, sitting with a jury, a jury of twelve persons having been duly and regularly empaneled and sworn to try said cause, E. E. Enterline, Esquire, and J. W. Snellbacher, Esquire, appeared as counsel for the plaintiffs. Messrs. Reynolds & Shea and I. Parker Veazey, Jr., appeared as counsel for the defendant, when the following proceedings were had, and the following sets forth all of the proceedings had on trial of said sause from the empanelling of the jury to the return of the verdict, and sets forth all the evidence introduced or offered on said trial, and all of the instructions given, offered, or refused, and all objections duly made and exceptions duly taken; where the word "exception" appears, it being intended thereby to indicate that the party to whom the ruling was adverse, duly excepted, to-wit:

WILLIAM B. WRIGHT, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

Mr. Reynolds: May it please the Court, at this time the defendant objects to the introduction of any evidence for the reason the complaint does not state facts sufficient to constitute a cause of action.

By the Court: The objection will be overruled.

Exception.

My name is William B. Wright; I live at Cutbank, Montana. I am a cowboy there for the Galbreath Cattle Company, one of the plaintiffs in this suit. I have worked for that company a little better than a year. With reference to a shipment of cattle that was made from Cody, Wyoming, to Mossmain in July, 1917, I accompanied the shipment from Cody to Seville, Montana. I was along with the shipment from the time it started from Cody, Wyoming, until whatever number arrived at Seville, Montana. The train arrived at Mossmain, Montana, between eleven fifteen and eleven thirty o'clock on the night of the sixteenth of July, 1917. After I arrived there I made an examination of the cattle to see the condition they were in. On first arrival I simply went up and down the train to make certain that all the animals were on their feet. At that time, as to whether they were all up, I found that the cattle were appatently all in good condition. The condition of the weather there at that time when I arrived was very warm, a very warm evening. I remained there in charge where the cattle were until they [fol. 22] started out the next morning. I was up during the entire night. I was there in the station. When I was not out with the cattle I was conversing with the station agent and night operator. After arriving there I observed a different condition in the cattle in the cars. After the cattle had stood there for possibly two hours I noticed that a great many of them were lying down. I prodded them up with the prod pole. They responded to prodding, got up. On my first visit along the train as I say there were quite a number of cattle down. I prodded them up and they responded readily and I went out gain in possibly the course of an hour and found still more down and yet they responded, got up upon prodding, and I went out again probably in another hour and there were still more down and most of them got up, although I had to work then longer on the cattle than I had previously, and I found from then until daylight that the cattle, although some of them would always get up on prodding, some would lie there for some time before I could get them to move. When I first got here I made my rounds of the train. My first trip which I made after that when I first discovered that they were going down after my arrival I think was possibly two hours after the first inspection. That was the first inspection after the original inspection on arrival. Everything was all right upon the first inspection. During the course of the night I had a conversation with the station agent there at Mossmain about moving on; I asked him what the delay was and if there was no means by which we could get service. I told him I wanted to move because I did not think that the cattle were doing well standing there on the siding. At first he gave me no definite information—said that there was nothing he could do, simply waiting for the power. About between three and four o'clock, as I remember it, he told me that the engine had jumped the track at the roundhouse in Billings, that was between three and four o'clock, and he said he didn't know how soon it would be or how long it would be before the power would get there.

I do not know how many conversations I had with him about moving on, but I spoke about it several times. As to the condition of the cattle, I told him that the cattle were getting—more were getting down as they stood there; the longer they stood there the more they went down. I got started from Mossmain the next morning at approximately six thirty A. M. During the entire night I would describe the condition as very warm. There was no air stirring there as the cattle were situated. I remember going through between rows of cars, that is box cars on the side of the train, and it occurred to me at the time that the circulation of air was shut off on these cattle. As to the next station at which we stopped, I have no recollection of the trip other than the stop at Judith Gap, Belt and Great Falls. From Mossmain to Judith Gap there were stops. As to the trip to Judith Gap, it seems to me that we ran very fast while we ran, but we stopped with jerks. That was my first ride on a stock train and it struck me as very rough.

Q. When you arrived at Judith Gap and along the route what was [fol. 23] the condition of the weather?

A. The cattle were in very bad shape.

The weather was still hot. I went along the train as its stopped at these other places before it reached Judith Gap. As to the condition of the cattle, I would simply say that some of the cattle it was impossible to get them on their feet. Before I left Mossmain, as I remember, there were a few of the cattle that were still down as we left Mossmain that I was not able to get up by prodding. They would be very few, just a few in the whole shipment. After ! arrived at Judith Gap I conducted my general inspection and looked at the condition of the cattle. I found the cattle to be in very bad shape at that time.

A great many of them were down and many of them would not respond to prodding. Some got up. There was one steer with his horn caught in the side of the car which could not get up; I tried to get him up by getting in the car but I had no success in getting a great many of the cattle up that were down. The train crew was right there and could observe the conditions. I saw the station agent at that place. He sent one of the crew, or one of the yard men, I don't know which, up the train to tell me to report to the office. I reported there. I had a conversation with him at that point. He requested me to sign a thirty-six hour release. I refused to sign the release on the grounds that the cattle were unable to go on in their condition. I told him that the cattle should be unloaded there and that we had had a very poor run from Mossmain to the Gap; that is to say side-tracked, and that it seemed best under the circumstances to unload these cattle and get them up. I told him we had been delayed at Mossmain seven hours. When I told him that they had better be unloaded he said he did not have the facilities, had not the men and the hay and water and could not take care of these cattle; said they had better go on to Great Falls. He requested me to sign a release and upon word of the dispatcher that I would get a straight run right through to the Falls I signed the release. After leaving Judith Gap there were stops before we got to Great Falls. There were about three stops. The chief stop was at Belt, that was the longest delay we had. The train was stopped on a switch there to allow a passenger and freight to pass. There was a cut bank on one side of the track and a row of cottonwood trees on the other side forming a sort wind-break. There was no air stirring there. It was very hot. We were kept there over an hour. As to the effect that that stop had on the condition of the cattle in the cars, the cattle were in worse shape, and it occurred to me at that time that there were three or four at least dead and there was no chance to get them up. As to whether there were more in number which were down at that point than there were at Judith Gap, there were more there; they went down very fast at Belt. I was able to get some of them up when I prodded them but a good many I could not. The train crew were around there so that they could see the condition of these cattle. I think they made about three stops between that and Great [fol. 24] Falls. The other stops were not for long periods, possibly not for over thirty minutes. The condition of the weather was the same, hot. At those places I observed and went and saw the cattle along the cars. I made an effort to get them up. As I recall, after leaving Belt I had no opportunity to get the cattle up. My other stops were before getting to Belt. I was not totally able to get them up at these other places after leaving Judith Gap. I was able to get part of them up. I arrived at Great Falls on the seventeenth at approximately six P. M. in the evening.

Q. And after your arrival there what was done with the cattle, if anything?

A. Well, the train was put on the siding to wait for a night shift, as I understood it——

Mr. Veazey: Just a moment. We move to strike out the answer, which was "to wait the next shift, as I understood it" on the ground that the witness is not shown to know the facts.

By the Court: Strike out that portion of the answer.

I was placed on a side-track. After I was placed on the side-track the cattle stood there for close to an hour, possibly more than an hour, before they were taken to the stockyards to be unloaded, but the stockyards weren't there. They stood there for an hour or more. The condition of the weather there at Great Falls was hot, very warm. After leaving the train stand there an hour or more on the side-track the train was taken to the stockyards and the unloading commenced. There was a crew of Greeks, section hands, began to unload them. They were either there at the stockyards when the train got there or they came up shortly after. The process of unloading the cattle was very slow. The men did not seem to understand how to handle the cattle and there was a great deal of brutality by the using of pickaxe handles and shovels. They got in the small endgate of the stock car, got in as far as their waist-line, and reached in and beat these cattle over the heads and noses with these pickaxe handles. Some of the cattle were down. That was some of the cattle jammed in the end of the car that they were trying to head around to the door to get them out. The stockyards were in poor condition to handle cattle. The panels of the corrals were broken down so that it was impossible to keep carloads separated. The watering facilities were very poor; the troughs were not water-tight and would not hold water due to cracks in the edges and because some of them were on a slope, not level enough to hold water. There was no running water in the corrals. The only way water was brought to the cattle was in a tank wagon and it was put in through the hose in the tank car but the troughs would not hold the water; the troughs were dried out, they leaked. There were some of the cattle there in the cars that they could not get out which were down and could not get up. All of the cattle were not unloaded at that time. After working on these cattle I think it was the next morning the cattle remaining in the cars were hauled up in front of the passenger depot. I could not say who it was that took them there; it was just the crew. I went up there. The [fol. 25] cars were drenched with water at that time. I did not direct them to take them up there and drench them in that way with water. I do not know how many cars were taken up that way; all the cars that had any cattle down in them, and that would be most of the cars as most of the cars had some cattle down that would not get up. They ran up to the passenger depot and then they came back with them and a few of the cattle had gotten to their feet and were able to get out and the balance were skidded out on boards outside of the stockyards. The balance of the shipment was not unloaded then the morning of the eighteenth. There was still cattle on the cars the morning of the nineteenth. We finished unloading sometime during the forenoon of the nineteenth. I should say that they started to unload within two hours after I got in there. This crew were there all night and worked off and on at unloading. Part of the time there was nothing doing, the engine went away. The engine had to be there to move them forth and back. The engine went away part of the time. This unloading continued at this same place at these stockyards where we first unloaded until we finally got them all off on the nineteenth. They were all unloaded in the chute except those which I previously stated were unloaded by being skidded out on boards outside of the stockyards. After they were all unloaded the cattle were kept for a time in the yards. From there they were herded, day-herded and night-herded in a field that lies between the Milwaukee and Great Northern tracks, and watered in an artificial lake which lies west of the track, if my directions are correct, on the opposite side of the track from the field in which they were herded. A man by the name of Milsap and myself were taking care of them while they were there. Some of the Great Northern Railway Company's men were around there while they were being held in the yards. They had hay to eat to begin with before we turned them out, afterwards they simply had the grass which was in the field. I am not certain, but they were kept there approximately five days before they were reloaded again on the cars, that is those that did not die. Mr. Russell Thorpe loaded them then. Some of the Great Northern Railway Company's men assisted. The treatment of the animals while they were being loaded was apparently all right. I was there all the time when they were being loaded. From there they went on to Seville, Montana. I did not make any count of how many cattle died. I remained, after I got to Seville, with these cattle that finally arrived there out of this shipment. I remained with them approximately a week. After I got there the cattle were weak and handled with difficulty, and there were a few head which died shortly after they were unloaded. That condition continued up until the time I left a week afterwards. The cattle were weak and in much poorer shape than the other cattle there. There were present with me after I left Great Falls up until the time I left a week afterwards Mr. Thorpe, President of the Galbreath Cattle Company, C. F. Milsap, and I believe there were—a man by the name of Latusky—Joe Latusky, that is all I recall. After I arrived at Seville Mr. Mil- [fol. 26] sap also remained during the whole time I was there, and I returned to Wyoming. I subsequently went back and worked for the Galbreath Cattle Company. The character of the work I have done for the company since I have gone back has been a little bit of everything. I have gone with shipments a great deal, done winter feeding and riding the summer range and general ranch work. That has been over a year. I have been through two fall shipping seasons.

(Noon 12-10-20.)

I do not have any record or recollection of how long the run took us from Great Falls to Seville.

Cross-examination of William B. Wright by Mr. Veazey:

I am twenty-five years old. In 1917 I was twenty-two years old. I first met Mr. Phelps in the middle of May, 1917. At that time I was at Los Angeles, California. In the spring of 1917 I was a student in college, in Dark Mouth College. I first entered Mr. Phelps' employ approximately the first of June, 1917. It was between the first and middle of June, I do not recall exactly. I was present at the loading of these cattle; I was in Mr. Phelps' employ on his Pitchfork Ranch where these cattle were kept prior to loading. My guess as to how large a ranch he had would be very general. I would say that a hundred thousand acres would cover that. I helped with the driving of the cattle from the Ninety-one Ranch to the point of loading. The Ninety-one Ranch was nearer to Cody than the Pitchfork Ranch. I would place the distance from the Ninety-one Ranch to Cody at about forty miles, or between thirty-five and forty. We started to drive them from the Ninety-one Ranch on July 13th, at I should say between four and six A. M., and we drove them from day to day after that up to the time that they reached a point about two miles from Cody, and there was the Cody Canal.

Q. On what day, and at what time, did you arrive at the Cody Canal?

Mr. Enterline: We object to this as incompetent and immaterial, if the Court please, under the pleadings.

By the Court: It might possibly be a little in advance of its proper order.

Mr. Enterline: Anyway, if Your Honor please, paragraph six of our complaint is admitted, and if that is admitted it is wholly immaterial what occurred before.

Mr. Veazey: That is inadvertent and is inconsistent with the other parts of the answer. The allegations of paragraph six are admitting that the Burlington transported them within a reasonable time. It is true that paragraph six says that they were in good, sound and healthy condition, and the other portion of the answer says specifically that they were not. I would like therefore to amend paragraph six of the answer, the first sentence, so that instead of reading "further answering this defendant admits the allegations [fol. 27] of paragraph six of said complaint" it will read as follows: "further answering this defendant admits the allegations of paragraph six in said complaint, except that part thereof that at the time of the delivery of said animals by the Burlington to this defendant the same were in good, sound and healthy condition."

By the Court: You may let the record show that the amendment will be permitted and the objection to the question will be overruled.

Exception.

(Question read.)

A. On July 15th, I do not know what day of the week it was. It was at about two P. M., close to two P. M. We watered the cattle then.

Q. You thereupon permitted them to graze after they were watered?

A. They were held on water.

Q. Did you give them plenty of water at four P. M.?

A. Not at four P. M.

Q. Between two and four P. M.?

A. Yes, sir

Q. And the actual, conscious, deliberate watering of the cattle took place between two and four P. M. of that day?

A. It did not stop at four P. M.; no sir.

I should say that the conscious, deliberate watering of the cattle by the men in charge of them at the canal ceased at about an hour before sunset. In the month of July that would be close to seven o'clock. After that, until they reached Great Falls, no actual, conscious effort was made by the men in charge to give them any water. After the cattle had been watered on the sixteenth, as I spoke of, they were grazed on the far side of the ditch, that is the far side from Cody, and bedded down there for the night. They were possibly three quarters of a mile from the ditch. After seven P. M. they were three quarters of a mile from the ditch grazing on the far side, between the ditch and that distance from the ditch. The nearest of the herd was not three quarters of a mile from the ditch. The outside of the herd would not be further than that from the ditch.

Q. Well, how near to the ditch were they the nearest of them?

A. The cattle were able to go to the ditch.

I think some of them did go to the ditch. It is a fact that the vast majority of the herd was during that night kept about a quarter of a mile away from the ditch, but they were not herded away from the ditch. From seven o'clock until we started to take them into Cody they were about a quarter of a mile from the ditch. They were feeding on the range there. The range there consisted of salt sage. We started at about four or five o'clock in the morning to drive them towards Cody. The cattle were trailed out in the usual manner from the bed ground and they crossed the canal and a small ditch that lies between the canal and Cody; then they were trailed on [fol. 28] through the town of Cody and over the bridge to the plateau or hill just below the stockyards at Cody. No stop was made at the canal or ditch to give them water. They arrived at Great Falls at approximately six P. M. on the night of July seventeenth.

Coming now to Cody, they arrived at Cody I should say before eight A. M. We separated them in the process of loading, separated the yearlings from the three-year-olds. That was done on the flat below the stockyards. The actual loading started at approximately ten thirty A. M. As to whether or not it was ten thirty A. M. or earlier than that, it was approximately ten thirty A. M. I would say that ten thirty A. M. was the earliest that any loading was done. The loading was finished at approximately three P. M. They moved out of Cody very soon after that, possibly thirty minutes. There were thirty-two cars. The weather there at that time was hot also. It seemed to me that it had been a hot summer during the June and July that I had been there on the range and in Cody, but it was my first summer in Wyoming. As to whether the temperature around Cody in the daytime would be about ninety degrees, or something like that, I could not guess as to that, I do not know how the temperatures run in Wyoming in the summer. As I felt the heat, I would say it was close to ninety. From seven o'clock in the evening of the fifteenth until three o'clock when the loading was finished these animals had been driven two miles, had been separated so that the two-year-olds were separated from the three-year-olds, and had been put into the pens and loaded on the cars and the loading was finally finished without any water having been given to the animals. I would not say that it is a fact that it was four o'clock in the afternoon of the fifteenth that they were last given water. I would say that seven o'clock was the latest. As to whether or not in the course of the transit from Mossmain to Great Falls, and at Great Falls, I stated to the conductor and the brakeman and to the yard men and to the persons that were assisting in unloading at Great Falls that the last time the animals were watered was four o'clock of the day they were loaded; I think I made no statement as to specific time. As to whether or not the conductor out of Mossmain and the conductor out of Judith Gap and to the people that were assisting in unloading or were spectators at Great Falls while the animals were there. I assigned as the reason for the condition of the animals in this transit that the foreman had not watered them for twenty-four hours before loading was finished; I will state again I do not think I said specifically twenty-four hours. I thought that the lack of water was the partial cause of the trouble at that time. It is not true that at that time I thought that the lack of water was the entire cause. I do not think that during these conversations in the course of the transit and at Great Falls with the persons to whom you have referred I attributed it also to the fast driving of the animals from the ranch to Cody. I think I did attribute the cause of the animals going down and the condition which ultimately developed to the fact that they had not been watered. When the loading of the animals was finished at Cody I did not have a conversation or discussion with the foreman [fol. 29] as to who should go along with them as caretaker. I received instructions from him to go. I told him then that I was inexperienced and wanted instructions as to what I was to do. I might have protested against being sent in charge of thirty-two cars of stock without any experience. I was sent with the cattle; that is he told me to go with the cattle. I asked him then for instructions in handling these cattle in transit. Prior to this time I had had no experience whatever. My instructions were to carry a prod pole and prod the cattle up whenever they got down; look over my train whenever they stopped; wire Mr. Thorpe if there was any delay and sign a thirty-six hour release—I mean that I was to wire Mr. Phelps.

Q. In substance you were put in charge of the thirty-two cars of stock over your protest to your foreman without any qualification, except that you had received advice that at stops you should prod up the cattle that were down and in the event of trouble wire Phelps?

A. Yes sir.

By the Court: Gentlemen, before we proceed any further, the last question asked is purely and simply a repetition of the questions asked before, and I can't afford to permit counsel to be repeating all the testimony and questions to the witness, because it is just a loss of time.

I arrived at Mossmain between eleven and eleven-thirty P. M. of the sixteenth—July sixteenth. When the train stopped there I went to the depot and then from time to time afterwards I walked out and looked at the train. The nearest part of the train was about thirty-five yards from the depot I should say; the nearest part of the train was about thirty-five yards from the depot, and then extended from that point away from the depot. I do not recall if it extended towards Billings or whether it was upon the wye towards Great Falls; I think it was towards Great Falls though—I think it was up on the wye toward Great Falls. I could not say definitely however as to that one way or the other, I would not be clear as to the direction in which Billings was or as to the direction in which Great Falls was. We pulled in there at night and it was my first time in the place. About two hours after the train was there I noticed first that the animals were down. After the arrival of the train I first looked over the train immediately upon arrival. Their condition then was apparently all right; they were standing up. I had looked over the cattle in between Mossmain and Cody at Frannie. Frannie is the only stop that was made between Cody and Mossmain which I recall. There may have been other stops but that is the only one I recall. The stop at Frannie was not over thirty minutes. That was in the evening, shortly before dark. It is possible that there were two other stops between Cody and Frannie of between thirty minutes to an hour which were made if I was asleep. If I was asleep it is possible that such stops were made; I do not recall any such stops. I do not recall that I slept any between Cody and Frannie. I would not say that there were not more stops of even thirty minutes or an hour. There may have been. When I went out two hours after the cars had arrived at Mossmain part of the animals were lying down—a few were lying down. I would say that there were from one to five ani- [fol. 30] mals down to the car—an average of one to five for each car. I then prodded the animals up, going the entire length of the train, inspecting the whole train. After I had finished prodding up the entire train I then went back to the depot. It was approximately an hour before I next went out to look at the animals. Their condition then was more down, lying down again. This was the third time that I had seen them but the second time that I had found them down. There were perhaps one to seven animals down to the car at that time. When I prodded them up they responded quite readily that time. I went the entire length of the train. After I had finished prodding the animals up that time as I recall I went out a little sooner the next time, probably thirty or forty minutes before I next went to see them. At that time there were more down and they responded less quickly to prodding. It took me a longer time. The first two times it took me not over fifteen to twenty minutes and the third time probably half an hour. As to how long after this third time it was when I next went out to see them; we were getting pretty close to morning. I guess from daylight on I was out most of the time. You see I was out when we first got there the first time I said two hours later, the third time an hour later, that would make it three o'clock in the morning. Well I was out there at about daylight and from that on I was out there pretty constantly until the train pulled out, so I made four visits—the first one they were all right and three times when I found them down and after that I stayed with them continuously. I was out and in the depot, but outside most of the time. When I left it was daylight. With reference to the journey from Mossmain to Judith Gap after the train had left as regards stops that were made and as regards any rough handling and as regards anything that I think was not satisfactory service; there were approximately three stops and I do not believe any of them were for over forty-five minutes. While we traveled we traveled fast and it occurred to me that our stops were rough. I remember being thrown about the caboose quite a bit. I had never ridden on stock trains before, but once or twice I had occasion to come down over the cars and it was pretty rough. From Mossmain, after the engine coupled on, to Judith Gap I do not think that the running time was slow but the actual time consumed from the time the engine started to leave Mossmain with its train until it arrived at Judith Gap seemed to me was a long time and the train was roughly handled. When I arrived at Judith Gap the condition of the animals was bad, many of them were down and many I could not get up At the stops between Judith Gap and Mossmain I went up and down the train with my prod pole and poked up what cattle I could. Before I got into the Gap there were some cattle that I could not get up. There were some when I left Mossmain that I had been unable to get up too. There were three stops between Mossmain and Judith Gap which I remember, approximately three I am not certain. The minimum time for the stops which I mentioned was forty-five minutes—approximately three stops of forty-five minutes each, and the maximum time to any one stop was about forty-five minutes. The time of the other two stops would not be over forty-five minutes, probably thirty [fol. 31] minutes, possibly that long. They all impressed me as stops of about the same length as I remember. I do not recall that I made any request on the agent at Mossmain to unload me. I did not ask him to take me to Billings to unload them. When I arrived at Judith Gap I was asked by one of the trainmen to come to the office to interview the station agent, which I did, and he asked me to sign the release, thirty-six hour release, which I did under the condition that he would wire the dispatcher at Great Falls and give us a straight run and have men, feed and water for the cattle upon arrival at Great Falls. I discussed with him unloading at Judith Gap. He said he had not the facilities to handle the cattle, neither men, feed nor water. The Exhibits marked "1, 2 and 3" to which you call my attention are the livestock contract signed at Cody with the Burlington, the livestock contract signed at Mossmain with the Great Northern and the thirty-six hour release signed at Judith Gap.

Mr. Veazey: We offer in evidence Exhibit 1, the livestock contract with the Burlington.

Mr. Enterline: That is part of your cross examination is it?

Mr. Veazey: Yes.

Mr. Enterline: No objection to that, Your Honor.

Thereupon said exhibit was received in evidence and is by this reference made a part of this Bill of Exceptions.

Thereupon defendant offered in evidence defendant's Exhibit 2, the contract with the Great Northern Railway Company, which is in words and figures as follows:

EVIDENCE: DEFENDANT'S EXHIBIT NO. 2

Mossmain, Mont., Station, July 16, 1917.

This agreement, entered into on the day above stated between Great Northern Railway Company, hereinafter called the "Carrier" and of second part, hereinafter called the "Shipper."

Witnesseth:

For and in consideration of the payment of the rate shown in its published tariffs, classifications and rules, based upon the valuations hereinafter stated, the Carrier agrees to transport 32 cars, said to contain 984 head *head* of steers and yearlings, from Mossmain, Mont., to ——, consigned to Galbreath Cattle Co. at Seville, Mont., to be carried by the Carrier to said place of destination if the same be on the line of the Carrier; but if, said destination be beyond the line of the Carrier, then to deliver or tender to the next connecting carrier, to be forwarded to place of destination as hereinafter provided; and the Shipper, in consideration thereof agrees to deliver said animals to be carried for transportation between the points aforesaid upon the following terms namely:

1. Whereas, the lawfully established and published tariffs, classifications and rules of the carrier provide ratings on live stock varying according to the actual valuations declared by the shipper, and fur-
[fol. 32] ther provide that shippers shall be required to declare in writing the valuation of said live stock at time and place of shipment, and if the shipper refuses to declare the valuation thereof and execute a live stock contract, livestock will not be accepted for transportation.

Now, therefore, the shipper hereby declares the actual value of said livestock, at time and place of shipment, to be as follows.

Each Horse or Pony (Gelding, Mare or Stallion, Mule, Jack or Jenny	$.....
Each Colt under one year of age	$.....
Each Ox, Bull or Steer	$75.00
Each Cow or Burro	$.....
Each Calf	$.....
Each Hog	$.....
Each Sheep or Goat	$.....

2. The Carrier shall not be liable for loss or death of or injuries to any of said stock unless the same be caused by the sole negligence of the Carrier, its servants, agents, and employes.

3. The Carrier does not undertake to transport said livestock in time for any particular market, and it shall not be liable for any loss on account of fluctuation in market price by reason of any delay unless the same be caused by the sole negligence of the Carrier, its servants, agents and employes.

4. The Shipper will load, unload and reload said stock at his own expense and risk, and feed, water and attend same at his own expense and risk while in the stockyards of the Carrier awaiting shipment, or while in cars, or at feeding or transfer points, or where the same may be unloaded for any purpose. In the event the Shipper fails or refuses to furnish an attendant to accompany the stock and feed, water and attend same, or in the event such attendant abandons the stock before destination is reached, the Carrier may provide an attendant and cause the stock to be cared for, and the cost of said attendant and care, including the fare of attendant and feed charges, shall be added to the freight charges on the stock and constitute an additional lien thereon; and the Carrier or its connections will hold said stock until all such charges are paid.

5. The Shipper assumes the duty to properly and securely place all of said stock in cars and keep said cars, securely locked and fastened so as to prevent the escape of said stock therefrom; and in case partitions or decks are put in the cars said partitions or decks are to be put in by the Shipper at his own expense and risk, the Carrier to be in no way responsible for the sufficiency thereof, or for any damage of any kind caused by defects therein; and the Shipper assumes all risk of loss or of injury to said stock for expense on account of the mixing thereof consequent upon the partitions or decks being displaced or defective.

[fol. 33] 6. The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the live stock at the place and time of shipment under this live stock contract, including freight charges if paid. Except in cases where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the carrier, at the point of delivery or at the point of origin within four months after delivery of the livestock or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Suits for recovery of claims for loss, damage or delay shall be instituted only within two years after delivery of the live stock, or in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed.

7. This contract does not entitle the holder or the parties named herein to ride in the cars of any train except the train in which the stock referred to is drawn or taken. The Shipper shall not be entitled to free transportation for himself or for his employes except in accordance with tariff regulations and the rules printed on the back hereof.

8. The Shipper guarantees that the stock shipped under this contract is not infected with and has not been exposed to any infectious disease, and if hereafter it shall be determined that the live stock is so infected, or has been exposed to infection, then the Shipper will reimburse the Carrier for the expense of disinfecting the cars in which the said stock is carried, and any stockyards in which it may be placed in transit, and the decision of any state or federal inspector authorized to inspect said stock shall be conclusive evidence of the infection or exposure to infection. The Carrier shall not be liable for or on account of any delays, detentions of failure to deliver the stock on account of any quarantine laws, state or federal, or on account of the action of any officers pursuant to said laws.

9. The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier beyond the route of said Carrier to whom said property may come for the purpose of transportation to destination.

10. No agent or employe of the carrier has, or shall have any right, power or authority to alter, modify or waive the terms, conditions and limitations of this contract.

The evidence that the Shipper after a full understanding thereof assents to all the conditions of the foregoing contract is his signature hereto.

Great Northern Railway Company, by W. S. Potts, Agent. L. G. Phelps, Shipper, by Wm. B. Wright, Agent. J. G. Sells (Witness must not be agent or shipper but a third person).

[fol. 34] Mr. Enterline: That is objected to as incompetent for the reason first that there is no showing here that the witness had any authority to sign it, and for the further reason that this defendant company cannot require the shipper to execute a second contract. It is bound by the first, signed with the Burlington Company.

By the Court: What is the purpose of the offer of Exhibit No. 2?

Mr. Veazey: The suit in this case is not against the Burlington Company as the initial interstate carrier, but is a suit against the Great Northern Company as the final carrier, and the contract entered into with the Great Northern Railway Company is competent if the Great Northern is to be sued as final carrier.

By the Court: I will withhold the ruling temporarily on Exhibit No. 2.

Mr. Veazey: No. 3 is offered.

Mr. Enterline: No objection to that.

By the Court: No. 3 is received in evidence without objection.

Evidence: Defendant's Exhibit 3

(ECL.) Form 70 99112.

(Great Northern Ry.)

(July 23, 1917)

Dated at Judith Gap, 7/17, 1917.

I hereby request and authorize the Great Northern Railway Company, transporting Cattle contained in cars N. P. 40372, Q. 62438, 62620, 62538, 67981, 69293, 63094, 65445, S. F. 55770, U. P. 35798, Q. 69126, 63206, 65398, 65387, F. W. 46905, Q. 60703, 65722, 67377, S. W. S. 8016, Q. 64673, 62878, 60883, 64647, N. P. 91313, 68399, 61598, 67776, 69040, 61841, 62344, 64939, 69082, loaded at Cody, Wyo., Station at 3:20 P. M. July 16th 1917, under way bills and contracts made at Cody, Wyo. station under date of 16th day of July, 1917, to confine said live stock in the said cars for thirty-six hours without unloading for rest, water and feed, as provided in an Act of Congress to prevent cruelty to animals while in transit, approved June 29, 1906.

Wm. B. Wright. F. C. Newcomb, Witness.

As regard to the signing of the thirty-six hour release as to whether it is not true that when I arrived at Judith Gap the yardmaster, or representative of the railway company told me that the dispatcher intended to carry me through to Seville and wanted a thirty-six hour release to get you through to Seville; I do not recall whether he stated that or not. I did not know what his reason was for the thirty-six hour release other than that the time was getting short; it may have been to get to Seville. I did not sign the thirty-six hour release so I could get to Seville, because it was at that time my intention that immediately upon arriving at Judith Gap I should endeavor to make Seville. It is not true that it was only after the [fol. 35] thirty-six hour release was signed that the discussion arose as to unloading at Judith Gap, or unloading short of Seville. The thirty-six hour release was signed after I gave up the intention of going to Seville. As I understood it, the thirty-six hour release was signed in order to enable me to reach Great Falls. I do not think that it is true that in fact the conversation about unloading at Judith Gap was initiated by the railroad men, suggesting that in their judgment the stock looked in bad shape and it would be a good idea to unload at Judith Gap; I think that was my suggestion.

Q. Are you positive of that?

A. Well, that was my ground for not signing the release. My ground for not signing the release was that unless they could assure us a good run to the falls I preferred to let the release go unsigned in order that they would be unloaded at Judith Gap. According to the agent, if I was assured of a good run to Great Falls I would still have use for the thiry-six hour release. I would say then that the agent told me that they would be short on time to Great Falls unless I had a thirty-six hour release. I understood that he wanted me to sign the release for that reason.

Q. Did you give the directions that you should go on and be unloaded at Great Falls?

A. What do you mean by directions?

. Q. Well, what was done. Your plan was to go through to Seville and then you say that after that you decided to unload at Great Falls. When did you form that intention and how did it come up?

A. I don't remember how it came up. It seems to me that the agent at Judith Gap told me that Great Falls was the nearest point at which there were unloading facilities to unload, and that was my reason for deciding to unload at Great Falls.

As to whether I accordingly gave them instructions to unload at Great Falls; I gave him instructions to wire the dispatcher to have things in readiness so that when we got to Great Falls we could unload there. A stop of better than an hour was made at this place I call Belt. I call this place Belt. As to whether or not it is a place outside of Belt; as I remember it the switch leads right out from the station of Belt. As to whether or not I could state that the stop was at Belt or at Armington, a place very near Belt, as I recall it was at Belt. As to whether on that occasion the train was on a sidetrack with open country on one side leading to a river and cotton wood trees on the other side and a bank; there was a bank on one side and cottonwood trees on the other, and not very much open country between. There was just a small wash there of perhaps thirty-five or forty yards. At Mossmain as regards where the cars were standing, as I remember they were standing between two rows of box cars. As to whether there was a row of box cars on one side of my train and a row of box cars on the other, I remember of passing between two rows of box cars; I cannot recall whether it was on both sides or whether I passed between the stock train and another row of cars. As to whether I am positive that there was a row of cars standing next to my train; there were other cars there than the stock [fol. 36] train. I do not remember when I first discussed with anyone the proposition that this stop at Mossmain was made anywhere other than in the open country without any obstruction. I do not remember when I first mentioned to anybody this proposition of box cars being there. More than likely I mentioned it to the trainmen on the train that I went up on. I cannot remember whether I mentioned to them that the box cars were there. As to whether I mentioned it to anyone in Great Falls, the veterinarian, stock inspector or persons helping in unlodaing or Mr. Thorpe or Mr. Phelps before the reloading at Great Falls; I think I mentioned the fact to Mr. Phelps. Putting myself back in the station at Mossmain, as to whether it is not true that my train was standing on a track which was next to two mainline tracks of the Northern Pacific; I would not say that, no sir. I would not say that that may have been true: I do not believe so. My recollection about those cars is not so certain that I know positively that my cars were not standing next to the main track of the Northern Pacific, I am not absolutely positive. I would not say that it may be as far as my recollection is concerned that this cattle train was left standing on a track next to two main tracks of the Northern Pacific and there were no box cars near. I have not at any time stated to anyone that these animals were down in the cars before I arrived at Mossmain. I did not at the time of the unloading at Great Falls and during the succeeding days before the reloading at Great Falls in discussing what had taken place and the cause of the animals going down say to various spectators there and others there that the animals had started going down before Mossmain. I did not on my arrival at Great Falls go and take dinner and telegraph to Mr. Phelps before the unloading began. I took dinner but I did not telegraph.

Q. And then returned after—you had finished dinner to take part in the unloading?

A. I was there when they started to unload.

I had then returned from my dinner. Unloading did not start just as I returned from dinner; it started some time after I had returned from dinner, possibly an hour. I took my dinner right in that small suburb that lies a short distance from the yard office; it is that part of Great Falls which is on the same side of the Missouri River as the yard office and yards of the Great Northern railroad. I did not go with the train crew to take dinner. As regards the unloading, I stated that some of the animals were not unloaded until the next day or even longer. As to whether it is a fact that all the cars were unloaded that night except that certain animals that were down in the cars could not be gotten out and they were unloaded as conditions permitted; I believe all cars were opened that night, yes, sir, partially unloaded. All were unloaded that were able to get out of the cars. That was not completed by ten P. M.; it may have been completed possibly by midnight. The succe-ding days that were consumed in unloading those animals that were down in the cars and sick. The sprinkling took place the next day after my arrival, on July eighteenth.

[fol. 37] Q. On that occasion the animals were taken across the river, and although you weren't present at the time you say, they returned afterwards well soaked?

A. The cars—I would not swear as to where the cars went, but they came back drenched with water.

The veterinarian, Dr. Nutting, might have taken this up with me before they were sprinkled, but I do not recall any such conversation with Dr. Nutting. I do not remember that he came to me and suggested to me that these animals had fever and it would be a good thing to cool them off by drenching them with water. I do remember his telling me to go easy on the watering, not to give them too much to drink; but I don't remember about the showering of the cattle with water. I do not remember having any conversation with him about that. I had not sent for a veterinarian. Dr. Nutting was a veterinarian that the railroad company had sent to me to assist me in handling the situation. No veterinarian was gotten by me until Mr. Phelps arrived. Mr. Phelps got a veterinarian I believe. After the sprinkling was done and the cars returned I said that I then found that some of the animals that had been sprinkled were standing up in the car. Before that I assume that they were down because they had been hauled away in the cars. The process was so tedious that those that were down had to be skidded out of the cars. As to whether when the animals were unloaded they all received water at once; an attempt was made to water them, but they did not all receive water at once. When we would unload a car we would turn them into a pen that had water in it and the animals would make for the troughs and drank such water as they could. They appeared to be very thirsty; they were very thirsty. As regards their condition and the condition of the animals that were down; I took pails and watered the animals that were down. In some cases when they were watered they would put out their tongues and taste the water and drink it; other cases they would simply horn the bucket out of your hands. Some of them would attempt to get up on their feet and start to fight me. Some of them got up when we were attempting to water them that way. It is not a fact that some of them were active, fighting, wild cattle; I would not describe them that way.

Q. Didn't some of the men in the case of the cattle that were down almost get horned for the reason that they would start for you and then you would get away?

A. A steer that is down can move his head quite a bit and that is what I mean by horning the bucket out of your hands. I do not remember of any jumping up on their feet.

As regards their disposition, as to whether it was a fighting disposition or quiet disposition as regards those that were sick and down; it seems to me that they acted as all cattle do when they are weak and things are not normal, that is they fight. I cannot give you any other symptoms that I observed as regards the condition of the cattle after unloading or in the process of unloading. I could not [fol. 38] describe the symptoms in detail other than they made for this water and the troughs and a great many of them—part of them laid down when they got in the yard. In the process of unloading I had only the assistance of the trainmen and section crew. I do not think I directed them as to what to do in the matter of unloading; I think I gave no directions at all on that. As to whether when I saw them beating the cattle with the sticks I gave directions about that;

I spoke of it, I do not call that directions. I spoke to the foreman in regard to having it stopped and in one or two instances took pick handles away from the Greeks. This beating was done to get them out of the cars, to turn their heads to the doors of the cars. I do not recall on what day we reloaded the animals; it was approximately five days later, that is five days from the seventeenth. It seems to me that they were at Great Falls as long as five days. When they were reloaded I accompanied the train to Seville but not as caretaker; Mr. Thorpe was caretaker. Mr. Thorpe was president of the Galbraeth Cattle Company. There were other men as caretakers. There was C. F. Milsap, Joe Latusky and Ed. Cassidy, Russel Thorpe and myself. Upon arrival at Seville we had no difficulty in unloading them. They were held there that afternoon and evening and the following day started to trail for the Galbraeth Cattle Company lease: that is in the northeastern part of the Indian Reservation. Seville is a station located on the Indian Reservation. Besides the people whom I have mentioned, Mr. Mr. Thorpe's crew—the foreman of which at that time was Mr. Reynolds—assisted in the unloading there. I do not know where Mr. Reynolds is now. The cattle were trailed through to the lease in two days—a distance of approximately fifteen miles. It was only fifteen miles from Seville to the corner of the lease. I was with the cattle for about a week following the time of arrival at Seville. I did not stay at Seville only two days and used up one day to drive them to the lease. I stayed at Seville the afternoon of the day they got in, that evening, and drove the next two days to the lease. We arrived at Seville right around noon and we were there that afternoon. I was not there the next day. That night or the next day we started to trail. We started trailing the cattle right away. It took us two days to arrive on the lease and then I was with them on the lease about five days until I returned, or about that time. From the time of the arrival of the cattle at Seville to the time I left them they were weak and emaciated and unusually hard to drive because of that condition. There was quite a difference between these cattle and other cattle that were held there at that time and trailed. I do not remember all of the men who were helping drive them; it was a crew that Mr. Thorpe had employed at that time.

Q. As a matter of fact now Mr. Wright, isn't it true that the balance of that herd was in first-class shape when it arrived at Seville?

A. You mean the balance of the Pitchfork cattle?

Q. Yes, the ones that you took from Great Falls to Seville.

A. No sir.

I will say that they were weak and looked in bad shape, the bal- [fol. 39] ance of that herd that was unloaded at Seville; they were in very bad shape. I could not say whether the entire band made the lease on the drive from Seville to the lease. There were approximately six head that died very soon after reaching Seville, and whether or not part of those were dropped out between Seville and the lease I do not know. I was trailing with another group of cattle. You understand the herd was divided. I think I was ahead of the

Pitchfork cattle. This other herd came from the Adams Cattle Company from some point, I do not recall just where, near Choteau, Montana.

Redirect examination of William B. Wright by **Mr.** Enterline:

You did understand me to testify when I was being examined on direct that I have had some experience or acquired some experience in the handling of cattle since this shipment. I have loaded cattle and shipped them to market since I went along with the cattle from this ranch up to Cody where the cattle were last watered and then put on the cars.

Q. You may tell the jury now whether that handling of cattle there was the ordinary way in which cattle are handled before being put on cars?

A. Yes, sir, I would say——

Mr. Veazey: Well, we would object to that as not proper cross-examination—well, he may answer but it opens up for new cross-examination by us.

By the Court: Well, I think he has already answered the question.

(Question and answer read.)

A. Yes sir, I would say the same as cattle are usually handled before loading.

Q. Now, in your drive about which you were cross-examined from this ranch—was it the Ninety-one Ranch?

A. Yes sir.

In my drive from the Ninety-one Ranch the cattle had watered from day to day as we went along there up until we arrived at Cody. The cattle were watered each day. We did not drive them continuously each day; they were allowed to graze through the middle of the day as cattle are ordinarily handled. That was done every day until we reached Cody. When we drove the cattle from the yards from which they were loaded on the cars they crossed this ditch near which they were kept the night before; they crossed two ditches; there was water running in both ditches. I was asked on cross-examination about this condition of the train of cars or box cars along at Mossmain there where the cars were standing on the track, as to whether I had made any mention of it afterwards. I remember my deposition being taken in November, 1919, by the railway company. Mention was made of it at that time.

Q. Mr. Veazey took your deposition on behalf of the company?

A. Yes sir.

[fol. 40] Mr. Veazey: I asked him what was the first time he mentioned this.

On cross-examination I stated to the jury that when they went into these yards where they were being watered they took such water as they could. By that expression I meant what water the troughs in their leaky condition would supply. The crew that was working there and assisting was in charge of a foreman there for the company; they were in charge of the section foreman I believe. There were about six men employed with me when I made the drive from this ranch up to Cody. Ned Sales was the foreman. I remember a man named Belden. It seems to me he accompanied us part of the trip; I do not believe he went all the way.

Ned Sales, a witness called on behalf of the plaintiffs, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is Ned Sales. I live at Meeteetse; I am working there with cattle for Mr. Phelps. I have had about twenty years' experience in handling cattle. That experience has all been in Wyoming, all parts of Wyoming. During that time I have assisted and been in charge of cattle that were driven to stations for the purpose of loading them and sending them to market. I have had experience in that connection in my employment with Mr. Phelps for about fifteen years. Mr. Phelps shipped his cattle from Cody. I am acquainted with the ranges along there and the range conditions where cattle are driven and the method of driving them, and have been for fifteen years. I was with this particular shipment that was made that is in controversy in this suit; I had charge of that herd myself.

Q. How long had you been acquainted or known these cattle and observed their condition prior to the time that they were shipped there?

A. Well, I had been with the cattle all the time from——

Q. From the time Mr. Phelps acquired them?

A. You mean how long?

Q. I mean this particular shipment of cattle?

A. Oh, I had been with the cattle ever since they were branded.

Mr. Phelps raised these cattle on his ranch. I was well acquainted with the cattle. The cattle that were shipped were good cattle; they were in good condition, good shape; they were steers. They started from the Pitchfork Ranch and were driven to Cody. That is forty miles from Cody, something like that. It took four days to drive them from Pitchfork to Cody; we were four days going; we were four days on the road. The condition of the range for grazing purposes at that time where the cattle could feed en route was good, pretty fair feed. As to opportunities to water on the way to the station at Cody, there is water I should say every six or seven miles. They had an opportunity and were watered and got watered daily. They had water every day. Mr. Wright got with us at the Ninety-one Ranch. We had driven them a day before we got to the Ninety- [fol. 41] one Ranch. The Ninety-one Ranch is seven miles from the Pitchfork Ranch. During the days that we would drive them they were not driven continuously during the day; they just grazed along—let them graze and just move them slowly. We arrived at

Cody or near Cody the day before we shipped them, which would be the fifteenth. We arrived there between two and three o'clock around there. Right at Cody where the cattle were they can water out of the canal there, and there is a big canal right close. In making the shipment the cattle had to go over the canal to go to the station. I was there when they were loaded. When the cattle were put on the cars they were in good shape for shipment. The way they were watered before they were put on the cars is the usual and customary way of cattle men handling stock; that is the way they all handle them that ship from Cody. This was no different from the way I had handled shipments before for Mr. Phelps. If an animal would be thirsty, in going over a ditch, I would not be able to drive it over; it would be apt to drink if it wanted water. I was there when the cattle were all loaded. When they were on the cars there and before they left they were in good shape, I would hold them.

Q. Now Mr. Sales, when a caretaker goes along with a shipment what duties has he to perform?

A. Well, the most important thing is to see that the cattle won't get down.

Mr. Veazey: Well, we object on the ground that that is governed by law, by the contract between the parties it is the duty of the caretaker to look after the stock and to see what should be done and direct what should be done. That is not a subject of opinion by any witness.

By the Court: Overruled.

Q. What does a caretaker do along with a shipment?

A. Look after the cattle.

Mr. Veazey: Just a moment. We object to the question on the ground stated.

By the Court: Overruled.

Q. The Court says you may answer.

A. He is supposed to look after the cattle and see if the railroad is doing right with them or not, and if they ain't give them to the railroad company ordinarily.

Q. Well, but when cattle get down for instance what duties does he perform in the way of taking care of the cattle?

Mr. Veazey: I would like to have the last question and answer read.

(Last question and answer read.)

If cattle get down the caretaker tries to get them up. The method of doing that is taking a prod pole and go along the cars and try to get them up. That is the directions I gave to Mr. Wright.

[fol. 42] Prior to being rounded up out on the Pitchfork Ranch these animals were in a pasture. We started rounding them up in the morning of the twelfth. We did not bring them to the pasture at the Pitchfork Ranch on the twelfth; we went to the Ninety-one Ranch on the twelfth.

Q. Well, where did you round them up, from the vicinity of the Pitchfork Ranch?

A. There is a pasture at the Pitchfork Ranch.

They had been in that pasture two or three days, something like that, and they had been rounded up prior to that from the vast acreage of one hundred thousand acres or so in the Phelps holdings there. We started leaving the Pitchfork Ranch the morning of the twelfth. We had not done anything with the cattle prior to that time on the day of the twelfth. We left in the morning, I do not remember just what hour, on the morning of the twelfth, I do not remember exactly what time of the morning, it was approximately around seven or eight o'clock, something like that and we went as far as the Ninety-one Ranch. There are two creeks there at the Ninety-one Ranch. They are the Rawhide Creeks they call them. The distance is seven miles to the Ninety-one Ranch from the Pitchfork Ranch. We arrived at Rawhide Creek or the Ninety-one Ranch about noon or a little after. The animals stayed there all afternoon in the pasture until the next day. We left there the next morning of the thirteenth and went to Meeteetse Creek. We went to Meeteetse Creek. We left the Ninety-one Ranch at about the same time, seven or a little around that, about seven o'clock and arrived at Meeteetse at about three o'clock. We left Meeteetse the fourteenth at about seven or eight o'clock in the morning or around that, and arrived at Sage Creek the night of the fourteenth. We stayed there all night; we got there in the evening. It was around four or five o'clock when we arrived at Sage Creek. We left Sage Creek the first thing in the morning, at daylight, that would be about four o'clock, about four o'clock of that day, and drove to Cody. We arrived at Cody around two o'clock or three. The distance from the Ninety-one Ranch to Meeteetse is about between ten and eleven miles, something like that, and from Meeteetse to Sage Creek it is about twelve miles, and from Sage Creek to Cody it is between eleven and twelve miles. We took two or three hours, something like that, off during the noonday when we were not driving the cattle; we would take a couple of hours; we generally let the herd rest. That would be about twelve o'clock, anywhere from eleven to twelve o'clock. During that time we would just stop and let the cattle scatter; then we would gather them together again and drive them on. It is not true that during a part of that drive I gave instructions to my men to hurry them along and to use their slickers. I did not tell them to use tin cans to drive them on. After leaving Meeteetse Creek the animals were next watered at Sage Creek. They were not watered at Sage Creek as we went over the stream; we had them there and [fol. 43] watered them. We held them on the north side of Sage Creek. There is a ditch along about two hundred yards the other side of Sage Creek. We watered them at Sage Creek itself and on this ditch. We watered them at Sage Creek and in this ditch which comes out of Sage Creek. As we went over Sage Creek we stopped them and had them watered; we held them there all that night. We arrived at Sage Creek around five or six o'clock, something like that, and then began watering them at the creek itself and at the ditch. They strung through from the creek to this ditch and we held them just on the other side of the creek that night. As to whether we watered them first at the creek or the ditch, we watered them on both. It is just a short distance between the creek and the ditch. An actual stop was made at Sage Creek to water them and then as we went on afterwards they would get a drink at the ditch.

Q. But you endeavored at Sage Creek itself to give them a full drink of water?

A. At the creek and ditch together; we didn't try to hold them on one stream or the other, just held them at both.

Q. Then no effort was made to water them at Sage Creek—just as they passed over you let them take such water as they wanted?

A. I say they watered on the creek and on the ditch both, and after they watered we held them at just the other side of the ditch that night.

Q. How long did it take you to water them at Sage Creek?

A. Ordinarily it takes two or three hours to water.

It took two or three hours to water this—about a thousand head—at Sage Creek, on the creek and ditch combined. They were herded not over two hundred yards from the ditch that night. They were not allowed to get down to the creek that night; we did not water them at night; we kept them about two hundred yards from the ditch, and the creek too. Sage Creek is a stream about four feet wide I should judge. I believe it is six inches deep. There is a bridge across it where we were driving these cattle, and on the lower side of the bridge below you can-ot get by with cattle; you can get by only on the upper side.

Q. So that you had to drive the cattle across Sage Creek in order for them to get any water on the upper side of the road above the bridge and only at that place?

A. They could water as they crossed above the bridge.

The ditch where they were watered at Sage Creek would be a half mile long where they could water, and about two or three feet wide, and a couple of inches—two or three inches, something like that—deep. That was the way that we watered them at Sage Creek, spending about two to three hours watering them at the creek and in this ditch. The country from the Pitchfork Ranch to Cody is open country, except at this Sage Creek crossing where there is a lane. That lane does not extend for three or four miles in either direction; it extends about a quarter of a mile in either direction and the land is about sixty feet wide. That was the lane through which we had to drive them to cross Sage Creek. It was around two o'clock when we arrived at the Cody Canal. As to whether we watered the cattle [fol. 44] between two and four P. M., we watered them till evening; we were watering them in the evening until six or seven o'clock. No other effort was made to water them after that until morning; we did not try to water them any more until morning.

Q. And where did you water them in the morning?

A. They could have watered as they crossed the canal and at the ditch if they wanted to.

They could have water at the canal and at the ditch if they had wanted to.

Q. But I am asking you when did you, in fact, give the cattle any water after that day, before the loading, from four to seven o'clock when you watered them at the canal?

A. We did not water them any more but we crossed ditches where the cattle, if they were dry, could have drank.

Q. But you did not see any of them drink?

A. They could have drank if they wanted to; they could have drank if they wanted to.

Q. You say that is the regular way to water a shipment. Do you mean that the regular way of watering a shipment is to water them about twelve hours before loading starts, or do you mean that they ought to be watered just before loading starts?

A. Ordinarily in shipping you water the night before and if you cross water that is sufficient.

I will not admit that if you water them the night before but do not cross water in the morning that that is an improper way of handling cattle.

Q. That is what I am trying to get at, as to what is the proper method.

A. That is the proper way.

Supposing that I did not cross water in the morning, it is right in my judgment to water cattle on the evening before we load them and not water them after that. So far as this ditch is concerned, the Cody Canal and any watering there in the morning, it is immaterial and of absolute indifference as to whether or not the cattle get any water that morning on crossing the ditch. On that morning, as a matter of fact, I did not try to water them in the ditch because I felt that they had had enough water by being watered the evening before, but they could have watered if they wanted to. In my judgment it would not be necessary that they should water there, not ordinarily. As to whether in my judgment it would be wrong to water them after seven o'clock of the day before loading; that all depends on when you load. If you load the next morning it is all right. If you are going to load the next morning, say at nine or ten o'clock, I would say it was wrong to water them after four or seven o'clock of the day before, it would not be necessary.

Q. So that on this particular occasion, drawing on your years of experience as a stockman, after you had watered them at seven o'clock you drove them right over the Cody Canal and did not give them any opportunity to take water?

A. They could have watered if they wanted. They were wild cattle.

[fol. 45] Q. And wild cattle will not stop and drink while they are being driven, while they are excited?

A. A thousand head of cattle, or around that, is pretty hard to crowd them across fast enough to keep them from drinking. You can't push them all across it at once.

Q. But if you ever get them excited they will not stop and drink will they?

A. I do not ordinarily get them excited.

We quiet them down in driving them; we try to keep them quiet, and we do not excite them very often. Some excitement is not necessary in the matter of driving, not where you are trailing stuff to ship. Aside from the opportunities given them, as to whether in fact the cattle did drink any at the Cody Canal on that morning, they would drink some, bound to.

Q. Whatever was done was practically nothing?

A. They had the opportunity to drink if they wanted to.

Q. You would say that it was absolutely of no necessity at all that they should have taken water there?

Mr. Enterline: That is objected to as repetition.

By the Court: The objection is sustained.

Loading commenced around ten o'clock, somewhere there, I don't remember just what time. Loading finished around two or half past—between two and three, something like that. The cattle moved out around four o'clock, around three or four I do not remember just exactly. The reason in my judgment why it is good practice not to water animals except the day before loading is that ordinarily that is enough water to do them until they are unladed again if they get moved along on the cars.

Q. Well, suppose that you are going to move a shipment for a period that will require thirty-six hours in transit after loading is finished to the time that unloading is begun, and loading is finished at four o'clock, between three and four o'clock in the afternoon, would you say that it was good practice not to water them after four to seven o'clock of the previous afternoon?

A. Well, if you was finished loading at four you couldn't very well water them; it takes a little time to water a thousand head of cattle.

Assuming that cattle are to start loading between nine and ten o'clock in the morning and loading will be finished between three and four o'clock in the afternoon, I would say ordinarily it was good practice not to water those cattle in the morning and not to water them until four to seven o'clock of the afternoon of the night before. If they cross water they can get it. As to whether or not I regard this matter of crossing the ditch as important or whether or not it is in my judgment that cattle ought not to be watered after four to seven o'clock of the afternoon of the day before loading, I would say that ordinarily if you water them the night before and you are crossing streams and an animal wants water they will drink where you have to go across a stream every time you ship. Where you water [fol. 46] in the evening that is enough, without you are crossing water. It is my judgment that if animals are watered at four o'clock to seven o'clock of one afternoon and they are then taken to the cars and loaded the next day and loading is completed at about three o'clock in the afternoon, in my judgment that is the proper way to handle them without giving them any water on the morning of loading.

Q. Now what is the reason for that, that would be twenty-four hours before loading is completed?

Mr. Enterline: I don't see how you would figure twenty-four hours from seven o'clock to three o'clock in the afternoon.

Mr. Veazey: From twenty to twenty-four hours.

Q. Now why is it that as a stockman with your years of experience you figure that that would be all right to have the stock twenty to twenty-four hours without water up to the time that they leave after loading is completed?

A. Well, it would not be that time.

As to whether I would say then that it would be wrong to have cattle off of water for twenty to twenty-four hours from the time they last had water to the time that loading was completed; they should not be off twenty-four hours, no, before they was loaded. As to how much time could safely be allowed from the time that they were last watered to the time that loading was completed, I would say it would be about eight or nine hours if they was dry.

Q. And in addition to that eight or nine hours that they could safely be without water from the time they were last watered to the time that unloading was completed they would stand in the transit thirty-six hours of transit, would they not?

A. I don't understand you.

In the loading I do not remember which we loaded first, whether we loaded the three-year-olds or the yearlings. The loading was done by loading an average of around twenty-seven, or somthing like that, of the three-year-olds to the car. Anywhere around there, twenty-six or twenty-seven; I do not remember just what we loaded. We loaded thirty-eight to forty yearlings to the car. I could not tell you what the average weight of the three-year-olds. They were cattle in fair shape; I could not give the average weight. I could not give the average weight of the yearlings. As to the condition of the range on this ranch during the spring and summer of 1917 prior to the loading of these cattle, I would not say that it was pretty hard up. As to whether we fed these cattle some that spring because of the poor range condition, we fed them in the spring before grass came. The grass in that year of 1917 was not any slower than an ordinary year in coming; it was just the same as ordinary years, was not any slower than ordinary. There was plenty of grass. There was no objection to the range at all. I do not think that we were moving from the Pitchfork Ranch to the Blackfoot Indian Reservation so as to get better range, I would not know anything about that. I would not know what was the object of moving. I will say that the range in the spring and summer of 1917 in that country was good.

[fol. 47] Q. What was it that you fed them while they were on the range?

A. While they was on the range?

Q. Yes.

A. Well, they fed on the grass.

We fed them hay and grain; we fed them hay and grain up until in April. These yearlings were just past a year old. Three-year-olds were past three; they were past three. They were shipped out in July, 1917. The three-year-olds calved in 1914, in the spring or along in the summer. The yearlings calved in 1915. I made a mistake there, the yearlings calved in 1916 and the two-year-olds in 1915. The yearlings calved in 1916 and the three-year-olds in 1915. At the time of loading we brought the animals from the place where we had night-herded them to Cody. That was about two miles or a mile and a half, something like that. In the process of loading and in getting ready for loading that morning we separated the three-year-old steers from the yearlings. That was done below the yards at Cody. In doing that we sent our horses and riders among the stock and cut the three-year-olds out from the yearlings. That would take an hour or two or three. That work was completed on the sixteenth in the morning at approximately nine-thirty. In the process of loading you cut them out and then you drive them to the pens into the stockyards and ordinarily you start in loading. Say for instance that you have a mixed bunch of cattle, you cut out whatever you want loaded first—two cars or four cars or whatever amount you have of that class of cattle, and put them in the yards and start loading and then bring the others in and keep right on loading until you are through loading. As to whether you separate those that you want to load from time to time in the process of loading; ordinarily you cross the river in the morning and get over there about five o'clock and start working your cattle, separate what you want to separate, probably be through about eight or nine, and then when the train is ready you start loading. In the process of loading you do not first separate the yearlings from the three-year-olds and after that you do not cut out the yearlings that you are going to load in a particular car. Whatever bunch of cattle you have cut out of the class of cattle you want to load, if you have only two classes, cut out one and put them in the yard and then load the others. That is the way we did on this occasion. We did not put only one carload in the yard at a time. We put in the three-year-olds and then the yearlings. I do not know if we loaded the three-year-olds first or not but I think so. We kept putting the three-year-olds in the cars until we got them loaded and then the yearlings until we got those loaded. We used horses to cut the cattle out. We did not use any pens. We did that right in the open country. That was for separating the three-year-olds and the yearlings. The cutting out of the different carloads was done right in the pens. That can be done with either men or horses. I do not remember which we did. You can cut them out afoot or horseback either one. That process of separating them both outside the yard and inside the yard is not a difficult process [fol. 48] that requires an experienced hand in handling them. It is not necessarily necessary to ride right up to the animals and keep them moving. It is not necessary in the case of wild cattle, and was not necessary in this particular case. It is an easy process. Ordinarily it does not disturb the cattle at all. It does not heat them up. They are very docile in this matter of separation. You ordinariy work the catte in the morning eary when it is cool. As to whether in the process of loading the animals are quiet or are disturbed and you have to drive them; there is no driving to it, you just cut them into a lane and put them in a car. They are not wild while you are loading them, cattle like these. These were not so wild.

Redirect examination of Ned Sales by Mr. Enterline:

I do not believe I know Hunter, the freight agent that operates for the Burlington. I do not know him.

Louis G. Phelps, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is Louis G. Phelps. I live at Pitchfork, Wyoming. I have lived in the state of Wyoming about twenty years. Prior to going to Wyoming I lived in Montana. I lived in Montana nineteen years. During the years that I have lived both in Wyoming and Montana my business has been stock raising, that is a stockman. During the time I have been living in Wyoming the last twenty years that has been my principal business. I am one of the plaintiffs in this suit. The property in controversy that was shipped at that time was the property of L. G. Phelps and Galbraeth Cattle Company. If any recovery is made in this suit it belongs to L. G. Phelps and Galbraeth Cattle Company. In reference to the bill of lading, or contract of shipment, that was signed by me and covers the shipment that *and* shipped at Cody, Wyoming, that contract belongs to the Galbraeth Cattle Company and L. G. Phelps. I have been in the cattle business about twenty years in Wyoming. During that time I have from time to time shipped cattle to market. An approximation of the number of cattle I have shipped yearly in the last twenty years, the total shipment as I figured it a short time ago was in the neighborhood of fifty-three thousand head of cattle my own and own raising, that is belonging to the interests that I am associated with or was associated with, during that time. During that time I also shipped in cattle from other points to Cody, not frequently but I have shipped in some cattle. I am thoroughly familiar with the range conditions and watering facilities from where these particular cattle were driven from the Pitchfork Ranch and to the Ninety-one Ranch and from there on to Cody where they were loaded at the station on the care of the Burlington railroad. I was not with this shipment when it was made; I was at the ranch and then left it and went on up—after having made my arrange- [fol. 49] ments as to the shipment, went on *top* to the other end expecting to be there to receive it. Prior to the receiving of this shipment by any railroad I had made the most painstaking arrangements as to the shipment and arrival and reception with the agents of the Great Northern and Burlington. As to what arrangement I had made with the agents of this road; I do not recall the men's name- but they had their office in the First National Bank of Great Falls, who were in charge of the transportation at that point. It was there I went and with those men that I made the arrangements and the schedule was arranged.

Q. And in reference to that what arrangement did you make Mr. Phelps?

Mr. Veazey: We object to that on the ground that any private arrangement made between a shipper and a carrier is against public policy and void. The duties of a carrier are prescribed by law and must be uniform to all, and no special facilities or special schedules, guarantees not provided for in the tariffs can be made to anyone. The question as to whether the shipment was reasonably handled is a question of fact for the jury, but no representations or agreements between the officials of the railway company and this shipper, or any other shipper, could in law be binding under the decision of the Supreme Court of the United States in a horse case; the case of a race-horse where they promised or said that they would expect to make a certain connection, and the Supreme Court of the United States said that as guarantees of that sort are not provided for in the tariffs and are not charged for that any separate private promises not provided for in the tariffs are against public policy; that all shippers must be treated alike.

Mr. Enterline: I do not want to prove, if Your Honor please, any special schedule; I simply want to prove by this witness that he advised the parties in charge of the importance of keeping the train in motion during that time. That is the only purpose.

By the Court: I think the offered testimony would only be competent as tending to show knowledge on the part of the company, possibly, of the conditions surrounding this particular shipment. The objection will be overruled.

Q. Now, directing your attention, Mr. Phelps, particularly to your conversation with parties in charge there about the shipment of cattle, if anything was said about why you wanted the service made promptly?

Mr. Veazey: Just a minute now. We object to that as hearsay, question. That meets Your Honor's ruling. If I might trouble the witness to heed the question carefully.

By the Court: Yes, read the question.

(Question read.)

A. My reason for wishing to make the run was two-fold—one that the cattle would thrive by being put through without unloading. The distance and all as I explained to the officials made it possible for the run to be made within thirty-six hours, and [fol. 50] taking the question up with the Great Northern people I was told or asked as to what——

Mr. Vearzey: Just a minute now. We object to that as hearsay. The witnesses themselves should be called and this would be departing from the ruling of the Court as to advice given to the railroad and the necessity of moving; in other words, what the railroad says is not important here, but what the shipper says to the railroad.

By the Court: Overruled.

A. —that a schedule allowing eight hours to the Burlington railroad to get to Mossmain would leave ample time for the officials of the Great Northern to take that train at Mossmain and lay it down in Seville within the thirty-six hours.

Q. Did they tell you that?

A. They said to me that if I could get out of the Burlington such a schedule, which implies a promise that if I could run cattle down in eight hours that I could be——

Mr. Veazey: Just a minute. We object to the answer and to the question on the ground that it seeks to elicit a special agreement made between, alleged to have been made between operating officials and an individual shipper.

By the Court: The objection is overruled. I am adhering to my original statement as to this particular testimony.

A. I am not trying to say it in a different way, Mr. Veazey. I am trying to tell it to meet this request. I was simply told if I could get an arrangement or understanding by which I could have the train in Mossmain within eight hours that the rest could be done and the cattle could be laid down in Seville within thirty-six hours. Carrying that idea out, getting the mileage and figuring the destination or meeting point and all it was arranged, and within seven hours and I think a minute or two the cattle were laid down at Mossmain.

Mr. Reynolds: I object, Your Honor, now to the witness volunteering this testimony. I think he has answered the question.

A. Well——

Q. Now, Mr. Phelps, what I want to find out is that you say under their schedule that they had, without promising a new schedule, that within the schedule that they had they could do that within thirty-six hours?

A. The mileage speaks for itself. We took the mileage up. Nineteen hours will accomplish that; that is reasonable. Schedules of that kind figured on between officials and the shippers is so common that we do that all the time. I figured that way with the Union Pacific and the Burlington in bringing my cattle out from there——

By the Court: That is hardly responsive.

[fol. 51] I did absolutely discuss that with them; that was the agreement, that if I would do it they would do it; that they would give me a schedule if I could get there in eight hours. The water conditions and all made it necessary to make this run, and it was understood and appreciated fully the reason for making the schedule and all, and it was threshed out more than once. I spent some two days to make these arrangements and to line up this run. I saw these cattle, of course, before they were shipped. When I last saw them before they were put on the train there at Cody they were A-No. 1 good cattle, which was termed ordinary livestock, ordinary livestock in good condition. I left a short time before they were loaded there and went on up to Great Falls and from there to Glacier Park, which is within easy distance of Seville, the place that they were to be shipped to. I intended to be up there when they were received there; that is what I was there for. I have heard this drive described from my Pitchfork Ranch to the Ninety-one Ranch and from the Ninety-one Ranch up to Cody in four days. I would say that drive was a most conservative drive; that it allowed for every contingency and protected the cattle in every way that a business man could protect that which he owned, and that experience in the past and since has justified me in making that statement.

Q. Now, Mr. Phelps, what are the watering conditions along from—watering facilities from the Pitchfork Ranch to Cody where these cattle were held the night before they were put on the cars?

A. They are way beyond the ordinary as far as the number of streams which are found between the two points. There is no point——

Mr. Veazey: We move to strike out the answer of the witness as a conclusion involving collateral facts. The witness should state the number of streams and size of them.

By the Court: Read the question.

(Question read.)

By the Court: Strike out the former answer.

From the Pitchfork Ranch where there is water on the Greybull to the two Rawhides which join just below the feed grounds that these cattle were on is about seven miles. From there, crossing two or three streams, Rawhide going out, Spring Creek, Rush Creek and coming on across Meeteetse Creek, we come to Horse Creek where these cattle were held. All of those streams are mountain streams and within a distance of from nine to eleven miles.

Q. You are acquainted of course with the watering facilities there at Cody?

A. Yes.

From Horse Creek we come to the creek called Sage Creek, which is again about ten miles, and then on to the Cody Bench on which is the Cody Canal, which is fed from the Shoshone River, another distance of nine or ten miles or eleven miles. Those are the dif- [fol. 52] ferent streams and the distances that I have mentioned. At each one of them the camps were made and the cattle watered.

Mr. Veazey: We move to strike out the last part of the answer about at each one of them the camps were made, on the ground that this witness was not present and could not know that to be the fact.

By the Court: Strike it out.

The testimony of my foreman, Mr. Sales, shows that the cattle were watered the night before and then loaded the next day. As to what is the custom in shipping cattle about watering before you put them on and as to the ordinary method of handling such a herd of cattle of the number that were handled on this occasion; the method that I follow and that is now being followed by others is to keep the cattle off water for a reasonable time before loading. You cannot load cattle safely and water immediately before loading.

Q. Why not?

A. Because of the condition of the cattle which is bad in their case and the condition of the cars which makes it a wet car and impossible in any safe way to handle your stock. They slip and slide and they are strained and injured in many ways. We all know that cattle can come out on the range for twenty-four hours and not suffer in any way and not come in for water, and we know from the way we have handled them all these years that the practice is the best practice and that it is the only safe way to handle a range bunch of cattle. We know when they smell water and want water as these cattle, held on the Cody Canal the night before three hundred yards away, that we could not have kept them from it if they chose. We know that in crossing these ditches that if a particular animal was crowded out and did not get his water the night before, we know it as a fact you could not hold those cattle off of water any more than you can hold a steam engine that was running down hill.

Mr. Veazey: Now just a moment——

A. That is all right, we know it.

Mr. Veazey: It seems to me that the answer is very far afield from the question, and it is only the preliminary part of that answer that is admissible, the proper way of handling cattle is to keep the cattle off before loading because otherwise they wet the car and are apt to slip and hurt themselves, and I move that the balance of the answer be stricken as not responsive.

By the Court: Well, I will concede that there is considerable of that answer that is not responsive to the question, but I do not know any way of segregating the parts that are from the parts that are not, consequently the motion will be denied.

Q. I notice, Mr. Phelps, you close your eyes occasionally. Have your eyes been injured?

A. They were badly injured, yes, I happened to get something in one of them that makes that green shade look like a red rag to [fol. 53] a bull; it kind of hurts me, but that is all right. I am here to be hurt I suppose.

By the Court: Mr. Phelps, if that light hurts your eyes you may change you- chair there.

In the course of shipments of cattle I have gone along in charge of the cattle as what is termed a caretaker many times. This year and the years in the last twenty years I suppose I have accompanied fifteen or twenty shipments personally. In this case Mr. Wright went with this shipment under my instructions to my foreman. I saw the cattle of this shipment after they were unloaded, or partially unloaded at Great Falls. When I got to Great Falls I found the cattle down, scattered from the pens for a distance of I should say one hundred and twenty yards or so. I saw the cattle on the ground lying along the track at different points. I saw some of the cars still standing on the track that had cattle in them that they could not move out, and I saw those cattle in the pens. I saw the cattle that had been released and were grazing around outside of the pens because they would not hold them. I saw the troughs that they were attempted to be watered at. I saw the tank cars and I saw the men in several instances attempting to water the cattle. I was there in time to see all the cattle and the condition they were in at the time of their being at the Great Falls pens and before they were turned loose and driven out to the lake to the feed grounds, and accompanied them, as I remember, when they were driven out, and was there when they were changed from the feed lots, so-called, or the pens, to this feed ground. As to their condition in a physical way, their physical condition as to strength and appearance; they were done up, in physical condition they were all in. The cattle were tested with a blood-test thermometer.

Q. Were you there at that time?

A. I was there and *was there and* saw it done and saw the post-mortems.

Mr. Reynolds: We do not object to the statement that they were down, but we object to this statement as to the results.

By the Court: Overruled.

Q. What did the thermometer show?

A. The thermometers that could record—we never knew what the record would be—the blood heat tested one hundred and ten, which would make the test at the top of the thermometer, and then the answer would be—we don't know where the thermometer would have gone to for it had gone out of sight.

Mr. Veazey: Did the witness see the thermometer himself?

A. I did.

The thermometer raised rapidly so that the test could not be made as to regarding the full temperature of the animals. I should say I saw thirty animals tested with the thermometer there where it ranged that high. They were lying down some of them stretched out, some of them with their heads up and their front legs bent [fol. 54] under them as animals lie that have not given up some of them stretched out as animals do with their legs before they die, stretched out to die.

Q. Now, Mr. Phelps, you have had experience in handling cattle, you have heard the testimony of Mr. Wright of a stop in the hot night at Mossmain and also at Judith Gap and by Judith Gap at a place called Belt where there was no air stirring, what effect would that have, of not keeping the cars, or train of cars, where there was no air?

Mr. Veazey: We object to that as stating a hypothetical question without stating all the conditions.
Mr. Enterline: Strike it out.

Q. Assuming that these cattle were put on the train in good condition at Cody and that then within seven hours they were landed at Mossmain, arriving there sometime after eleven o'clock on the sixteenth, they were held there on the train on the track during the hot night until the next morning at about six thirty, at which time the train was moved; stopped several times, about three times, before reaching Judith Gap with the hot weather continuing, stops made of approximately forty-five minutes three times; then at Judith Gap it stopped there, and then after passing Judith Gap it stopped for over an hour at a place called Belt where it was at a cutbank and cottonwood trees on the other side where there was no circulation of air, and from time to time the cattle were going down increasing in numbers,—to what do you attribute that condition?

Mr. Reynolds: We object to that as incompetent, irrelevant and immaterial, and as a hypothetical question not involving the essential facts involved in this case.
By the Court: Overruled.

Q. You can answer as to what your opinion is; what was the result from such treatment?
A. My opinion is that the treatment would result in the permanent injury to the condition of the cattle, that to keep them moving was essential, that the speed at which they moved was important.

Mr. Reynolds: We object to these voluntary lectures such as we have been getting. The answer of the witness is sufficient.
By the Court: The objection is sustained.

To keep them moving was essential. The reason for the necessity of the train keeping in motion is the circulation of air. The cattle, to travel, must have the air that comes from motion. They could not move themselves and in order to do well or prosper at all they must have the motion of the train which brings the air, or else the ability to move themselves.
Q. You are referring now to hot weather times?
A. I am referring to hot weather times and I am referring to the time that we shipped these cattle
It was our request and was so stated and manifested in all of my talks that it was necessary.

[fol. 55] Mr. Veazey: Now, Your Honor, we object to any more of this voluntary testimony.
By the Court: Sustained.
Mr. Veazey: Move to strike out everything which is not in answer to the question.
By the Court: Strike it out.

Mr. Veazey: What part is stricken out?
By the Court: That latter part.

In my talk with the Great Northern I called their attention to the weather as being one of the reasons to move the cattle promptly. I saw the cattle there, saw their condition. I later saw the cattle after that. I was at Seville when they arrived there. Nine hundred and eighty-four head left Cody on that shipment. They were counted out at Seville. A tally was kept there by someone else but I got it, but I did not make it myself.

Q. Did you make any actual count there, Mr. Phelps, as to how many were dead there at Great Falls?

Mr. Veazey: I wonder if we could not stipulate as to that. We will stipulate that nine hundred and eighty-four head were delivered to the Burlington at Cody, and that one hundred and forty-two died at Great Falls and some more were left at Great Falls, seven in number, and the balance then moved on, and that five of the remaining seven afterwards died at Great Falls.

As to those other two, and what became of them, I think they were sold by Dr. Kesselring. As to whether we folks got the proceeds of the remaining two, I do not know, but I do not think we did. I will have to leave that to Mr. Thorpe who knows. Mr. Thorpe paid the freight charges. He will know about the expenses except some small cash items which are all grouped in the expenditures; he will have the totals. The expenditures that were made at Great Falls, Mr. Thorpe will have the total of that.

I saw the condition in which the cattle were received at Seville. I know what condition cattle are ordinarily received in where there is nothing unusual occurs in the shipment. I have shipped thousands of head of cattle. Directing attention first to the animals that died, as to what was the reasonable market value, or fair market value, of those cattle at Seville if they had arrived in the condition that ordinarily cattle are received in a shipment and within the time, say around from the eighteenth to the twentieth of July, 1917, I would say ninety-five to a hundred dollars per head. I saw the condition of all the other cattle as they were unloaded. I would say that they depreciated in value, the remaining cattle. Taking the remainder, if they had been received at Seville, Montana, within the time usually taken for that, say from the eighteenth to the twentieth day of July, 1917, if they had been received in such condition that ordinarily cattle would be received if there had been no injury to them, in the usual way, they would be worth a hundred dollars per head. The remainder of the cattle that had not died, if they had not been injured they would have been worth one hun- [fol. 56] dred dollars. Taking into consideration the injury and the condition in which they were in fact at the time they were received at Seville, they depreciated t-enty-five to thirty per cent in value. As near as I could estimate it at that time they would be worth seventy or seventy-five dollars per head after this.

Cross-examination of Louis G. Phelps by Mr. Veazey:

I have bought and sold cattle on the reservation, not at Seville but on the reservation, in that same general vicinity. 1917 was my first operation on the reservation. It was not in succeeding years that I bought them on the reservation; it was in that year. In the year 1917 we sold and had bid in the Adams herd and other herds and had sold to others on the reservation cattle of our buying, and had traded in cattle on the reservation. The negotiations for those sales I should say were made with me as much as with Mr. Thorps and others, as I loaned the money—passed on the transaction. I loaned the money afterwards and therefore was consulted in the transaction during its making, and as it was made and at the consummation. Those sales were made the following month in that same year; I cannot say whether they were made in August or September. I have a great many business transactions and expect that part of the cattle we had and owned were sold, and in selling them my brother had taken the paper and that way I was conversant with the transaction in being told that the transaction was made, or could it be made, and if it could could I carry the paper, and transactions of that character, made me familiar with the transaction during its making. As to whether I would figure the value of those Pitchfork cattle at Seville in July, 1917, substantially the same as their value at Cody, plus the freight rate; I would add to that the value of the cattle by reason of the ownership of the lease, but as a matter of fact the cattle stood, were priced at ninety dollars. The major portion of those cattle, the big end of those cattle, were priced at ninety dollars, and at the sums which make me give the figures I do. I had not just sold them to the Galbraeth Cattle Company; I do not want any confusion as to that, the Galbraeth Cattle Company and L. G. Phelps. The fact that L. G. Phelps puts a price on cattle which go to the Galbraeth Cattle Company is my way of determining that. I had made a negotiation for the sale of the cattle prior to their being shipped to the Galbraeth Cattle Company. The sale was perfected after the cattle were on the range and at a time some months later; I do not remember the full consummation of it. I cannot fix the time of the transaction because of the incorporation and taking over and all. The ownership was in the two interests in common and remained in common. When I sold it to the Galbraeth Cattle Company I kept my interest in this transaction in common with the Galbraeth Cattle Company. I was a stockholder in the Galbraeth Cattle Company. I was the heaviest stockholder.

Q. And L. G. Phelps was shipping these cattle from Cody, Wyoming, to the Galbraeth Cattle Company, of which he was the heaviest stockholder.

[fol. 57] A. Don't get confused on that now. The Galbraeth Cattle Company was a company incorporated to do business on the reserve, or reservation, and buy cattle and to trade. Among the cattle that went to them were the L. G. Phelps cattle at a later date than the date of this shipmen-.

Drawing the distinction between stock, livestock and the other kind of stock, I was a large certificate *of* stock holder in the Galbraeth

Cattle Company. I was a large certificate holder at some dates, but I haven't all the dates at my finger's end. I am not a stockholder in that company now; I sold my stock and retained my interest in this transaction. But a price was made on the cattle to the Galbraeth Cattle Company. I think that price was ninety dollars. It was not ninety dollars at Seville.

Q. Ninety dollars at Cody?

A. Ninety dollars, seventy dollars and fifty dollars as I have it. The ninety dollar valuation was on the aged cattle; those would be the three-year-olds. The next figure was seventy dollars; that was on the two-year-olds. The valuation of fifty dollars was on the yearlings. So far we have divided the shipments into yearlings and three-year-olds. There were so few two's that you don't need to count them except for just very close figures. The cattle that I refer to would not include other shipments than this one. There were only thirty-seven head and didn't amount to anything at all. They were not in another shipment; they were in this shipment.

Q. Were they two-year-olds, coming three?

A. No, they were over three.

And those thirty-seven would be maybe short two, not branded until the spring next year. They were three-year-old stuff and yearlings and past a yearling age. You see the calves come in April and May and these cattle were out in the summer so that they were past the yearling age.

I have it that there were four hundred and eighteen head of yearlings in that herd that we shipped. That would make four hundred and seventeen head of three-year-olds. Those were what were alive you know; I don't want you to be confused in this. I am reading from my tally after we got up at Seville you see. I notice this is on Hotel Haggerty paper. That is what I found left then. I made the *date* in different cases. That data covered one hundred and thirty-nine head of ninety dollar cattle were dead and ten head of the fifty dollar cattle were dead, and that total will make nine hundred and eighty-four cattle. In other words, there were one hundred and thirty-nine substantially three-year-olds that died and ten yearlings.

Q. Now, in figuring values as a stockman there at Seville or at Cody, you base it on the Chicago market do you not, what you expect ultimately to get in sending them to Chicago?

A. What we expect to sell them for?

Q. Yes.

A. No sir; what the people who have them on the range are willing to pay for them rather than to get them out of Chicago or anywhere else.

[fol. 58] In the end the stockmen are all figuring on selling their stock in the Chicago market at the proper time and when they are mature and with a hundred other interests covering the transaction other than the feeder class of cattle that will make into this money. Then the price at Cody and the price at Seville as a matter of fact would be substantially the same, the price of western beef cattle on the range in Wyoming and on the range in Montana would be substantially the same, except as you have the franchise value or the value that obtains to the man who has on the range that which he wants; that price and the Chicago price do not always govern. In July, 1917, if a man was going to go and buy the Pitchfork cattle I would say that he would have to pay more for them at Seville than he would at Cody, if he was operating at Seville. Taking the average buyer, whether he is operating there or elsewhere, coming in to buy cattle, the market at Seville and Cody would not be substantially the same, and for this reason the cattle, if in Seville with a range adjacent, would take on a value that they would not where the other man did not have the two ingredients—the range and the cattle. The same is true of every transaction. The range on the reservation was not better than the range at Cody, but a man has to have a certain income; he has to coin a certain amount of his increment into cash and he may sell any God's quantity of range. I am selling this year and I have *have* more range than the stock I have. I have coined into money a certain amount of my property to keep going. As to what conditions there were in July, 1917, that would make the price less at Cody than it was at Seville, I would say it is the difference of the man's needs and his wishes. There might be a five dollar spread between Cody and Seville. I did not say a ten dollar spread—I would say from five to ten. I would like to make it ten. We will say from five to ten as the case might be.

Q. Why is it that you value the cattle at Seville at ninety-five dollars to a hundred dollars a head when you placed a value on them to the Galbraeth Cattle Company of ninety dollars for the three-year-olds and fifty dollars for the yearlings?

A. I think that is where you are laboring under a misapprehension. I catch your point now too, only I had one hundred and thirty-nine dead cattle in the ninety dollar class when you are asking me why I value them at a hundred dollars. It is very plain I am not talking from a viewpoint of the man who lost the major portion of his cattle in the ninety dollar class. I can see very plainly where very politely you are making me out a liar, but I am simply quoting from the one hundred and thirty-nine dead the *the* viewpoint of a man who had something dead and what it would have been worth to him if they had been alive. I understand that the only object of your cross-examination would be to correct inaccuracies on my part or misunderstandings on yours. I surely misunderstood. I was talking from the viewpoint of the loss. I would not say that if those deads had arrived at Seville in good condition I would have valued them at ninety dollars a head. There was a freight charge that would have been worth around a hundred dollars.

[fol. 59] Q. How is it that as regards the cattle that arrived at Seville which were alive that you placed a value on them of ninety dollars for the three-year-olds and fifty dollars for the yearlings, and yet for the cattle which died which were ten yearlings and one hundred thirty-nine three-year-olds you say the average value of that herd would be ninety-five to one hundred dollars at Seville?

A. I catch your point and of course it is very well taken. I was taking—there was a difference in the classes of cattle, of their freight and a reasonable sum, and that sum is what I have been naming when I said a ninety dollar animal I advanced it to ninety-five dollars, both in my mind and in my claim.

The result of your tedious cross-examination is to correct my direct examination in that when I placed a value of ninety-five dollars to a hundred dollars as an average on the animals that arrived at Seville I meant to limit that to the *the* three-year-olds, and when the claim was made each class of cattle was valued that way and the same prices were followed. As regards the yearlings that arrived there, I would place a value on them at an average of sixty dollars.

Q. That is fifty-five or sixty?

A. Well——

I am valuing those as to what they were worth to me on the lease.

Q. But what would be the value to someone who was going to buy them in the open market?

A. Buy them there with the lease?

Q. No, without the lease, just to buy the cattle; that price as I understand is a value placed by you in consideration of the fact that you have a lease there. Now, what value would you put on there if you were just going into that country to buy the stock?

A. From ninety to a hundred dollars.

Q. It would not make any difference then on account of the lease?

A. From ninety to a hundred. I priced them at ninety at home and I am saying from ninety to a hundred dollars.

I was asked as regards the proper method of keeping cattle off water prior to loading.

Q. And if you won't misunderstand the form of the question——

A. I won't.

Q. It seems to me you gave a guarded answer. You said they should be kept off from water prior to loading a reasonable length of time?

A. Yes sir.

Q. Now, might I ask you on cross-examination for the benefit of the jury to make that more specific, how much time prior to loading being finished do you think they should be off water?

A. Will you interrupt me when I get off the right answer?

Q. If I might suggest this for you to save time—if you would put yourself in Cody instead of in the court room, which is harder for us all, and give us as short an answer as you can.

A. I will.

A would take the cattle to water in the afternoon of the day that [fol. 60] they were expected to be loaded—or in the afternoon if we expected to load the next day. I would let those cattle after arrival go to water in the natural way without too close herding or handling, and when the cattle had taken what water—as we call it "the fill" that they wanted and had settled down and had gone back to water again during three hours, I would take those cattle and then place them as we placed them——

Q. Just a moment. May I make this suggestion, that is where from the lawyer's point of view you get off the track.

A. Well, I would let the cattle take what water and what fill they wanted that night. The next morning at four o'clock or five o'clock as the necessity for getting them across the river came——

Q. Now, if I might interrupt, I am assuming that there is no river there.

A. Oh, there has got to be because there is. You can't get away from the fact that you have to cross that river, and you have got no conditions except physical conditions that exist, and you couldn't handle these cattle in any other way than I described.

Q. That is true, but on cross-examination I am entitled to take that ditch away from there and to say for instance that you have watered these animals in a trough between four and seven in the afternoon. Now how long after that would you water them again, assuming that you were not going to cross any canal?

A. No other way than as they were watered.

It is the thing which I believe best, watering from four to seven or eight o'clock of the night before and shipping them the next day. Assuming that I have watered the animals, not at a canal, but that I have watered them at troughs and then have watered them the night before at between four and seven at troughs, and I have then taken them say three miles from the water so that I would not be going to double back and water them at the troughs again, as to whether I would load those animals on the cars without any further water or would water them at the yards at Cody; by preference I would leave the cattle off water rather than water them the next morning before they were loaded, absolutely. Supposing that water was available in the yards and I have watered between four and seven o'clock in the afternoon of a certain day and I drove the animals then away from that water towards Cody and water is available in Cody, and that I loaded them without watering and the loading is finished between three and four in the afternoon, I would say that was all right. In preference to watering the next morning as a choice I would take the earlier watering rather than the late. My cattle would come out better that way.

Q. You would allow twenty to twenty-four hours off water from the time they were last watered to the time a train left as a safe practice?

A. Seventeen to eighteen hours I would say, yes sir. That is the time. I cannot say what I would do, as to whether I would not ship them off water more than seventeen or eighteen hours, but I think that even then I would. I would not water cattle immediately before loading under any condition that you can propound to me as a question. [fol. 61] With the night ahead of them I consider the right time to give them a good fill of water before loading is the night before. With the night before them to quiet down and take their fill and settle down off water they would not take any water after they had taken their fill, and between that and watering the next morning the best practice is to water at night. I would say then that if they are watered between four and seven at night that rather than give them a fill of water at Cody the next morning I would rather they would not have water at all.

Q. So then, putting the canal which is there *there* and you had been the foreman which was in charge of the stock, rather than to allow those animals to drink as they passed over the canal you would drive them over faster than they would ordinarily go?

A. Well, you put words in my mouth. I would water them the night before and approve of my foreman's course.

Q. You would not water them the morning of the loading?

A. Not from choice as between the immediate loading starting at ten o'clock in the morning. You see what you do to me is to put me in the state of having answered a question at the minute they were loaded when in practice there has got to be a lapse of time there that no man can avoid. There is three or four hours in the process of loading that you have got to go through and every distinct part of the work, which is cutting your cattle and putting them in the cars, during which time you could not do the thing which you would want to do. I would water the night before, we will just clear the deck with that. I will go of record. If I was the foreman in charge of that herd after I had watered them the night before, and as I crossed this Cody Canal I would only have stopped to water the cattle there as the individual animal would drink and wanted to drink. As they wanted to drink they would drink. We have shipped some forty or fifty thousand cattle that way. As to whether then I would approve not watering them except as an individual animal wanted water; I would approve of absolutely watering them the night before in the cool of the evening and putting them on the cars the next morning as we did without any more water.

Q. That is what I wanted?

A. Yes sir, absolutely.

Q. That would mean then that from the time that they were last watered, from four to seven o'clock, until three o'clock the next day they would be how many hours off water?

Mr. Enterline: Object to that as a matter of computation.

By the Court: Sustained.

I would not make any exception to that rule if the weather was hot. I would expect those animals to continue to go in transit for thirty-six hours after the loading was finished without water, in hot summer weather, except that it draws a conclusion that is not a fact. The fact is, if they had been run through as we have been talking about in twenty-eight hours this case would not have existed. As to whether they would have run through in thirty-six hours to Seville, they would have run through from Cody, Wyoming, to Seville in [fol. 62] twenty-eight hours, if they had kept moving, and that is what your schedule is and I figured it at twenty eight hours and a few minutes that your train was actually running; that you would have been in in twenty-eight hours and a half, or twenty-eight hours and twenty-six minutes absolute running time, if you had not ditched your engine and could not get to Mossmain.

Q. Suppose you are shipping cattle to market and they arrive just before the expiration of the thirty-six hours, they arrive at a feeding point where they are required to be unloaded for five hours feed and rest. With reference to their being apt to wet the cars and make the cars slippry, when would you water them then?

A. Well, I can answer that——

Q. Pardon me, maybe you misunderstood. When would you water them at this unloading point on the way to Chicago?

A. We run them just as many miles as we can.

Q. I am afraid I have confused you. Suppose you are shipping from Great Falls to Chicago——

A. Yes.

We will say that the thirty-six hour period has expired at Williston and I unload the animals at Williston as required by law, where I am required to give them a five hour rest.

Q. Now, as soon after that five hours as possible the shipper wants to move on to the market?

A. Yes sir.

Q. Now when in that five hour period do you water them.

A. From the time they come into the pens the water is turned on.

Q. And you give them a big fill of water?

A. They take what water they want, and when they are satisfied they go to eating and they are loaded then. If a shipper is a wise shipper they are loaded just as soon after the five hours as he can get his cars again and they go on to the market and they make the full thirty-six hour run rather than the twenty-eight which is his election.

Q. And you give those animals water five hours before reloading and fill them full of water?

A. You give them the water because you can't help yourself, not though you care to but that you must. You have got your hours, you have got your law, a good or bad one, that is made by a man that is not a cattle man. You have to face the inevitable. You give them the water, you get them through just as soon as you can and you get them on the cars and off just as soon as you can.

I do not think that that practice of watering them during that five hour period is a bad one because it wets down the cars and makes the cattle slip, but because that can be done. My practice is not that method at all. I ship in up till the full thirty-six hours; I stay and fill twelve hours at an unloading point. I said a moment ago that it would be the best practice for a shipper to move out of the unloading point in five hours rather than stay, rather than ship to a twenty-eight hour point. You did not take the whole sentence. Rather than ship to a twenty-eight hour point and make two stops, I elect the [fol. 63] thirty-six hour shipping method and run to the full limit in the thirty-six hours and then I take the full stop.

I do not consider it dangerous to water them within that five hour period but I much prefer the other method as I do in my business at Cody, so I do at these feeding points. I make a long run from Cody into Alliance, using my thirty-six hours, and then I make a good long stop. I water and then I put my cattle on dry feed and then I make my next run on into Omaha without ever making a stop again. I call from nine to twelve hours a long stop according to the daylight opportunity to load if there are no electric lights.

Q. That includes the time in loading and reloading?

A. Well, take it this way. If I arrive at twelve o'clock at night and unload I would prefer to load then we will say at two o'clock in the morning in order to get my run. Oh, I am consistent.

I do not feel that the other practice is actually injurious to cattle, but it is not as good as my system from my point of view. It is so bad from my point of view that I do not do it.

Q. It is so bad from your point of view that you would follow the other method in hot weather?

A. There are wiser men than I, that do that same thing. You see I have told you that the cool night made a lot of difference; they have all the night after they are watered. That cool night makes a lot of difference. It is always cool in the mountains between daylight and dark.

It is cooler at night than it is in the daytime and the cattle quiet down. I know that that is one thing that you are going to bring out in this case. The night at Cody was not cool. I said there is always a lot of difference between the heat of the day and night in this country. The cattle quiet down at night.

Q. When you said a cool night makes a lot of difference you had in mind the cools nights at Cody at the time they were loaded, didn't you, frankly?

A. Why, frankly, as between the day and night it is cooler at night than in the daytime.

Redirect examination of Louis G. Phelps by Mr. Enterline:

With reference to mountains, Cody is located some twelve or fifteen miles from the mountains and less than seven miles from the mouth of the Shoshone Canyon, with an altitude of something like five thousand some hundred feet.

Russell Thorpe, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is Russell Thorpe. I live at Cutbank, Montana. I am president and manager of the Galbreath Cattle Company, and have been since its organization in 1917. I had had experience in the cattle business of about twenty-six or twenty-seven years. I [fol. 64] have had that experience in Montana and Wyoming and Texas, South Dakota and Nebraska. My experience has been continuous in Wyoming, during all the time I have mentioned. During that time I have bought and shipped cattle and become familiar with the transportation of cattle over the railroad. With reference to these cattle out of which this controversy arises, I saw them first I think it was sometime in June, 1917. At that time they were on the Pitchfork Ranch near Cody. After that I saw them at Great

Falls, Montana. That was during the time about which Mr. Phelps was testifying as to conditions existing there. I got there on the morning of July nineteenth. I found a number of those cattle at that time in a dead and dying condition. I was there when temperatures were taken of the animals and saw the temperatures as they were taken in the thermometer. In those that I saw it registered one hundred and ten, and that was the extent of the thermometer. I would say that I saw possibly five or six head where the thermometer was actually that high and I read the thermometer myself. The cattle were in a weakened and exhausted condition all, that is the entire shipment. I noticed some that were dead.

Q. How many were there that were dead there in the way of actual loss of dead animals?

A. I counted one hundred and forty-two head.

Mr. Veazey: We have covered that as to the number that were dead; that is covered by the stipulation.

Mr. Enterline: Well it was your own stipulation.

Q. Is that correct, the number that were dead there at Great Falls?

Mr. Veazey: If it please the Court, I stipulated that there were one hundred and forty-two.

Mr. Enterline: Five more died there at Great Falls and there were two more that were sold.

Mr. Veazey: If that isn't the stipulation it had better be withdrawn.

By the Court: Let is be withdrawn. I understood counsel for plaintiff to say that he did not know how many. Let the record show that the statement is withdrawn.

I counted one hundred and forty-two head of dead cattle there at Great Falls before the train left. Subsequently there was five head out of the seven head of cattle left behind that died. That made one hundred and forty-nine head. We lost the entire seven that remained there including the two head that remained alive. I understood that those two were butchered. We did not get any benefit from them in any way. They were taken charge of by the veterinarian.

After that, after we got to Seville, there were additional cattle died after we arrived there—about six head died. I was at Great Falls and remained there until the cattle were shipped on, and went with the cattle to Seville and assisted in unloading them and taking charge of them afterwards. I know and observed their condition from [fol. 65] time to time after that. I was in Great Falls there I think about four or five days if I remember correctly. A reasonable length of time for a run from Great Falls to Seville would be ten to twelve hours. I have shipped over that road from time to time and know the conditions. I did not keep any record as to what run they made at the time they went on on this particular occasion, only as I know that they made the usual run. I say that I have had experience in the handling of cattle for some number of years and shipping them on trains. I know what the effect is where a train stops in the heat where there is no air stirring, and whether that has any effect upon the condition of the cattle. It does have an effect.

Q. In what way?

A. The train standing, the cattle become uneasy, restless there—would act very similar as these cattle did in this instance.

Mr. Veazey: We move to strike that out, that they acted very similar as these cattle did in this instance, on the ground that the witness is placing himself in the position of the jury and is deciding for himself.

By the Court: Strike it out.

As to what effect, if, any, it has upon them, standing up or going down in the cars; the effect would be that they would go down in the cars. I have heard the testimony here as to the way these cattle were watered before they were put on the train. I have had experience in that regard and know what the ordinary and usual custom is about watering cattle before they are put on trains. The usual custom of watering them before putting them on trains is to load the cattle dry; that is without watering them before putting them on immediately.

Q. Did you have any personal observation, Mr. Thorpe, where you had done that, or where parties traveling or shipping cattle with you, the same kind of cattle only that they had watered them immediately before they put them on the train?

A. Yes sir.

Mr. Veazey: That is objected to as incompetent, irrelevant and immaterial; going into matters on direct examination which are not involved in this case.

By the Court: He hasn't asked for it yet.

Overruled.

I observed the effect it had. I have heard the testimony about the way these cattle were watered, in controversy here, the night before and then loaded about nine or ten o'clock the next day without making any particular effort to water them the next morning.

Q. What would you say as to whether that was the usual and ordinary way of loading cattle and loading them?

Mr. Veazey: We object to that as calling for a conclusion of the witness without giving the facts to the witness.

[fol. 66] By the Court: It is hardly the proper way of asking that question, Mr. Enterline. The objection will be sustained.

(12-11-20.)

Q. Now, directing your attention to the way the cattle were watered, as I said before, you may state to the jury whether that is the ordinary way of watering cattle, where they are shipped as they were in this instance?

A. No sir.

Q. I do not think you understood me. Where they were watered the night before and not watered particularly the next morning, except as the individual animal might take water, now I am asking if that is the ordinary way in the shipment of cattle and the proper way?

A. Oh, at the time of loading?

Q. Yes.

A. Yes sir. I understood that it was at Great Falls.

I went to Great Falls on the morning of the nineteenth. I had received a telegram from officers of the company relative to my cattle being there. The telegram, Plaintiffs' Exhibit "A" which you hand me, is the telegram to which I refer in my evidence in the preceding question. F. S. Elliott, whose signature appears to the wire, was General Superintendent of the Great Northern railroad at Great Falls at that time. It was pursuant to that wire that I came to Great Falls.

Mr. Enterline: We offer it in evidence. (Plaintiffs' Exhibit "A.")

Mr. Veazey: We object to that on the ground that the telegram is not the original telegram, the original telegram being the one that would be sent from Great Falls; and in the second place on the ground that it is hearsay and is plainly simply giving somebody else's account so as to get Mr. Thorpe there, giving in substance what the caretaker said, and in any event the person sending the telegram would have to testify to having sent it. The telegram contains mere opinion, concerning which the person sending the telegram might, or might not have the facts.

By the Court: Overruled.

Exception.

EVIDENCE: PLAINTIFF'S EXHIBIT "A"

Western Union Telegram

Received at 2 15 P. M.
Number 71. Received by M. W. Check-Cash.
Dated Gt. Falls, Mont., 7/18-1917.

To Russel Thorp:

Your stock arrived Gt. Falls 6 P. M. last night and unloaded on request of your men in charge. Stock in very bad condition due to [fol. 67] excessive heat several being down in cars reload soon as men in charge requests we handled in 13 hrs between Mossmain and Great Falls.

F. S. Elliott.

I was at Cutbank, Montana, at the time that wire was received.

Q. Now, when you arrived at Great Falls, what, if any—what were the cattle suffering from, if anything?

Mr. Reynolds: We object to that, Your Honor, as incompetent.
By the Court: Overruled.

A. The cattle were suffering from heat prostration.

I did testify I had had some twenty years' experience in handling cattle. I knew of the kind of cattle that were in this shipment, the classification of them.

The testimony by Mr. Phelps has been that there were yearlings, two-year-olds and three-year-olds. There were ten head of yearlings which died; one hundred and forty-five head of three year olds died. There were from hundred eighteen head of yearlings that we received and still lived. There were thirty-seven head of two-year-olds which we received and which still lived. The thirty-seven head constituted the entire two-year-olds in the shipment. That left three hundred and seventy-four of the three-year-olds that lived. That constitutes the entire shipment of nine hundred and eighty-four head. During the time that I have been in the cattle business I have become familiar both with the values in Wyoming and in Montana in the general cattle business which I have been in. I was, and am, acquainted with the reasonable market value of these cattle if they had arrived in the ordinary condition that cattle would have arrived at Seville, Montana, say on the eighteenth of July to some five days later when we did receive them in 1917. The reasonable market value of the yearlings at Seville, Montana, along from say the eighteenth day of July, 1917, up to the twenty-third day of July, 1917, if they had arrived in the ordinary condition they would have arrived in, would have been sixty dollars a head. The reasonable and fair market value of the two-year-old cattle, had they arrived in condition such as they would ordinarily have arrived had it not been for the conditions under investigation here, at Seville, Montana, between the dates I have mentioned; namely, from the eighteenth day of July to the twenty-third day of July, 1917, would have been eighty dollars a head. The reasonable and fair market value of the three-year-olds at Seville, Montana, along from the eighteenth day of July until the twenty-third day of July, 1917, had they arrived in the condition they would ordinarily have arrived in had there been no unusual occurrences along the route, would have been one hundred dollars a head. The fair and reasonable market value of the yearlings per head in the condition in which they did arrive at Seville, Montana, at the dates which I have mentioned was not to exceed thirty-five dollars a head. The fair and reasonable market value of the two-year-old cattle in the condition in which they arrived on those dates, about the eighteenth day of July, 1917, and running [fol. 68] along to the twenty-third day of July, 1917, was fifty-five dollars a head. The fair and reasonable market value of the three-year-old cattle in the condition in which they did arrive at Seville, Montana, on the dates I have mentioned; namely, from the eighteenth day of July to the twenty-third day of July, 1917, was not to exceed seventy-five dollars a head. I attended to the paying of the freight bills when the cattle arrived at their destination. I observed the cattle and they were under my observation, those that did arrive, from then on, and observed their condition from time to time.

Q. What do you say as to their improvement, if any, and the length of time incident thereto?

A. May I ask what you refer to by length of time?

Q. I want to ask you how they improved if it took a long time or short time, for the purpose of showing the effect of their condition at the time you received them.

A. The improvement on those cattle as to condition was very slow, in fact they did not fully recover.

We still have some of those cattle. As to their condition at the present time, as the result of the condition in which we received them, I would say that they lack a great deal of being normal for cattle of that age and class. I would say we still have approximately twenty or twenty-five head of that number of cattle now, or the Galbreath Cattle Company has them. I saw the method or way they handled the cattle there at Great Falls while I was there, the train crew, I saw the crew that were assisting in the handling of the cattle there.

Q. I want you to describt to the jury what you saw them do.

Mr. Reynolds: When was this Mr. Enterline?

Q. At the time he was there at Great Falls, and he arrived there on the nineteenth. What was done to the cattle there and assisted by the railroad men?

A. At the time I arrived there they had a number of men who were attempting to take care of these cattle, and up to the time of loading I saw no particular objection to the handling of the cattle. While the cattle—those that were able to be out were under our own care we had charge of that end of it; they had charge of the cattle that were down in the yards and appeared to using effort to look after them, but when it came to loading them they had a number of men there who evidently were very inexperienced in loading and handling cattle, and I can say that I never saw a bunch of cattle loaded that were handled any rougher or abused any more.

These men irritated the cattle by using pick handles or clubs to beat them over the heads, and were so brutal and rough in their treatment that I emphatically protested to the yardmaster or the railroad trainmen that seemed to have charge there as well as to the foreman of this gang. I afterwards observed injuries as a result of that beating. I observed that the cattle, quite a number of them, were suffering from big jaw as a result of the injuries. I cut some of them open afterwards and found out. With reference to the six [fol. 69] that died there at that place, we cut two head open and we came to the conclusion from our observation that this was a direct result—broken bones were shown on the jaws there where we examined them. I saw these men hit the cattle around the head.

Besides the freight bills that I paid I paid other moneys to the company; I have a receipt for that also. In addition to the moneys that I paid to the company for freight and the other expenses the plaintiffs incurred other expenses there at Great Falls for extra men and expense incident to caring for them.

Q. How much did you expend for that purpose in the care of the cattle at Great Falls?

Mr. Reynolds: We object to this as incompetent, irrelevant and immaterial. The complaint does not state a cause of action as to moneys expended.

By The Court: Overruled.

A. We expended I think about three hundred and forty-nine dollars.

I have a memorandum of the amount we paid. Referring to my memorandum I would say we expended three hundred and forty-nine dollars for labor and expense, and this is exclusive of the veterinary charges or anything of that kind. That is not included; we have not included that. Plaintiffs' Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, O-A, O-B, O-C, O-D, O-E, O-F, O-G which you hand me are receipts for freight which I paid to the Great Northern Railway Company on receipt of the cattle at Seville, Montana. That represents the entire freight charges from Cody, Wyoming, to Seville, Montana,—the through rate paid by us and on each car.

Mr. Enterline: We offer each of them in evidence, each and all.

Mr. Veazey: We object to them as incompetent, irrelevant and immaterial; not admissible under the pleadings, for the reason that the pleadings make no reference to freight charges in any way whatsoever as an element of damages in the case, and they could not be included as damages.

By the Court: The objection will be overruled.

Mr. Veazey: As I understand, they are not offered so that the plaintiffs may recover any of the freight charges paid.

Mr. Enterline: No, they are offered so that we will give your company the benefit, so that under the Acts of Congress they may have the full benefit.

Mr. Veazey: We object to them in any event as incompetent, irrelevant and immaterial under counsel's statement.

By the Court: Overruled.

(Which said Plaintiff's Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, O-A, O-B, O-C, O-D, O-E, O-F and O-G were thereupon received in evidence and are by this reference made a part of this bill of exceptions.)

[fol. 70] I have computed the entire amount of freight paid by us. We paid two thousand seven hundred and twenty-four dollars and forty-eight cents freight to the Great Northern Railway Company, which was the entire amount of the freight bills paid by the plaintiff. Plaintiffs' Exhibit O-H which you hand me is the receipt for the moneys which we paid to the Great Northern Railway Company for expenditures for some hay at Great Falls, Montana. I paid that at the same time that the freight bills were paid, so that the plaintiffs paid at that time that amount also.

Mr. Enterline: We offer that in evidence, Plaintiffs' Exhibit O-H, Your Honor.
Mr. Veazey: No objection.
By the Court: Let the record show it is received in evidence without objection.

Which said exhibit is by this reference made a part of this Bill of Exceptions.

Some of the freight bills are dated the twenty-seventh day of July. I did not pay it on the day that the cattle arrived there; I paid it some few days afterwards. I have made an estimate or compilation of our losses and expenditures.
Q. So that you can give it? Will you produce your memorandum from which you made it?

(Witness produces memorandum.)

Mr. Reynolds: We object to this, Your Honor, as incompetent, irrelevant and immaterial and not sufficiently definite; the question not confini-g the witness to damages set forth in the pleadings.
By the Court: The objection is sustained to the question in its present form.

I have made an estimate on the testimony as given as to the valuation and our losses. I have made an estimate in accordance with the valuations that I have given as to the loss per head of each animal and the loss to each one that died, as well as freight expenses and other expenditures to which I have testified.
Q. You may refer to your memorandum that you have made. Have you got it?
A. Yes sir.
Q. Now, taking on the loss for instance on the one hundred and fifty-five that died——

Mr. Reynolds: We object to that, Your Honor, as incompetent, irrelevant and immaterial, and as a matter of mathematical computation for the jury to determine, and repetition.
By the Court: Overruled.

The loss of the yearlings, the ten yearlings, in accordance with my testimony, is sixty dollars a head or six hundred dollars. The loss of the one hundred and forty-five of the three-year-olds which died I would estimate at one hundred dollars per head—fourteen [fol. 71] thousand five hundred dollars. The loss on the four hundred and eighteen yearlings at a loss of twenty-five dollars a head would be ten thousand four hundred and fifty dollars. The loss to the thirty-seven two-year-olds was nine hundred and twenty-five dollars, and the loss to the three hundred and seventy-four three-year-old steers at a loss of twenty-five dollars per head would be nine thousand three hundred and fifty dollars, making a total loss as estimated by me, without giving the benefit of the freight of thirty-five thousand eight hundred and twenty-five dollars. After deducting the freight it would leave our net loss on the cattle thirty-three thousand one hundred dollars and fifty-two cents. Adding the hay and expenses of our men to that made our total loss thirty-three thousand eight hundred and twenty-nine dollars and fifty-two cents.

Cross-examination of Russell Thorpe by Mr. Reynolds:

Q. Mr. Thorpe, those valuations of—that you have given as to these cattle if they arrived in normal condition at Seville was peculiarly Seville valuations, were they, or was that difference from valuations at other points in this vicinity?

A. I think not.

There was a particular difference in valuation upon the market generally between Cody prices and Seville prices. That difference would be based on the point at which cattle could be purchased.

Q. What I want to get at is why would there be any difference between Cody prices and Seville prices as to the general market, not for any purpose of feeding cattle, would there be any difference in the general market conditions?

A. I don't know as I understand what you mean by general market conditions.

If a person were to buy cattle at Cody or at Seville and had no particular use for the cattle in the way of a special range or anything of that kind there would be a particular difference in valuation.

Q. What would make that difference?

A. The difference would be in the—may I apply this to this particular instance?

Q. Yes, you may illustrate.

A. I will illustrate that these cattle—we placed the valuation at the time they were turned over to us—were worth this valuation plus the freight and the conditions under which we were to run them on the Blackfoot Reservation.

In fixing those valuations we had in mind the fact that we were going to run them on the Blackfoot Reservation. Supposing, instead of having our range at the Blackfoot Reservation we had a range at Cody, as to which would be the more valuable to us, the Cody lease or the Seville lease, I should say that the valuation would be in relation to the cost price at Cody and what they were valued at at Seville, allowing for freight.

Q. But supposing you did not have any range at Seville and you did not have any range at Cody, you were simply going into the gen- [fol. 72] eral market to buy cattle, would you then make any difference between Cody and Seville?

A. I do not know as I quite understand.

I consider these cattle more valuable to me at Seville largely by reason of the fact that we had a reservation there, or lease for grazing upon the reservation.

Q. Suppose you did not have that lease at all, you did not have any more opportunities for grazing at Seville than you did at Cody, would they have been worth any more to you at Seville than at Cody?

A. I think they would, yes, I don't know as I quite get you yet. In fixing my valuation I fixed it at what they would be worth to me.

Q. Not what they would be *f*orth to anyone who would step in to buy them to ship them to Chicago, for instance?

A. We fixed the valuation as to what we could afford to pay for them. That valuation was fixed, and transport them to Seville, and based on the price of cattle at Seville.

Now, for instance, cattle were bringing, of the same class, a higher price at Seville than they were in the Cody range; for instance, if we would undertake to buy these cattle around that country we would have to pay the valuation which we have asked around Seville. At Cody they were at a lower price.

The price is fixed in this particular case largely by reason of the fact that we had this lease at the reservation, to this extent: that we had the lease and we wished to stock it. If we had gone out into the open market in Seville and bought cattle for this lease we would have had to pay the hundred dollars and sixty dollars for this class of cattle. They were what we ordinarily term stock cattle of good quality. They were Herford steers. I cannot tell you about how much the three-year-olds would weigh. I cannot tell you about what the yearlings would weigh. I have been in the cattle business twenty-five or twenty-six years.

Q. Do you mean to say that you have been in the cattle business twenty-five or twenty-six years and you cannot put an estimate on a cow or steer?

A. I can on the market.

Q. Can't you even if you saw it in the yards, stockyards?

A. I can when they arrive at the market.

Q. Can you when they are in the stockyards at Cody and Great Falls?

A. I might put an estimate on them.

Q. Couldn't you make one that would be fairly accurate too?

A. I question whether I would risk my judgment on it.

In my experience in handling cattle for the last twenty or twenty-five years I have been exercising that judgment more or less in estimating weights of cattle when they arrive at cattle markets. I never weighed a steer in my life or any cattle that I bought prior to their arrival at the market. When I get into the mar*g*et I figure I can [fol. 73] put a good estimate on the weight, fairly good. I cannot do it at Cody or Seville from the fact that I have never bought cattle from the scales, buying them that way.

Q. What is the difference in patting an estimate on the value whether you see them at Cody or Chicago?

A. I think a person would be mistaken to back his judgment principally on weight.

Q. I am not asking you to back your judgment strictly on weight. I am asking you for an estimate. And do you mean to say, Mr.

Thorpe, that you have been in the cattle business for twenty-five years and have formed the ability of quite accurately estimating the value when upon the market and you cannot estimate the value when they are at Seville or Great Falls?

A. I can estimate their value, yes sir, at Cody and Great Falls, or Seville, or on the range.

Q. I do not mean the value, I mean weight instead of value. I will substitute the word weight for value. Do you mean to say that you can estimate a fairly good estimate of the weight of cattle upon the market and you cannot do it at Cody, or Great Falls or Seville?

A. Yes sir.

As a matter of fact, I did not make an estimate of what these cattle would weigh before we shipped them. I did make an estimate before we shipped them to Chicago, before they were loaded on the cars. We did not weigh them before we loaded them upon the cars to ship them to Chicago. We made shipment to Chicago in 1918—I think it was in the fall. Before we shipped them to Chicago I made a guess of their weight. I do not recall what I guessed them to weigh at that time. As to what their weights were when they were shipped from Cody, I would not undertake to make a guess as I have stated before. I would not undertake to make an estimate of the weight of cattle at the time of purchase. I have always bought cattle by the head and I have sold by the weight and by the head. When I buy cattle by the head the probable weight at destination of that animal enters into the determination in my mind. As to whether when I buy a steer or any other cow by the head, as a part of the valuation I would put upon that head I take into consideration its weight; I take into consideration what I think they might weigh a year hence. I would not also, necessarily take into consideration what they weigh right then and what they will gain between then and the market.

Q. In other words, you are taking into consideration what they will weigh at the time of market, and not any consideration as to what they will weigh at the time of purchase.

A. I give a general consideration as to the looks and general appearance of the animal. I would give a fair consideration when I buy as to the weight at that particular time, just in passing probably.

Q. You do, then, consider weight when you buy?

A. I consider what the weight might be at ultimate destination and market.

As to whether I still maintain that I did not consider that the weight is at that time; I still maintain that I did not, only in a very general sort of way.

[fol. 74] Q. The matter of weight does not enter into your consideration at all, except what they will weigh about a year hence?

A. I take into consideration the general condition of the animal, and only estimate the weight, or make an estimate in a very general sort of way as to weight.

When I make that estimate I take into consideration what gain I can put on that animal, in a general sort of way.

Q. But you do not take into consideration what he will weigh at that time.

A. I take into consideration the general condition of the animal, and if he looks to me like he would weigh about so much when marketed.

In regard to the depreciation of these cattle by reason of the treatment to which I have referred, I do think there was a difference in the percentage of depreciation as between one class and the other. There would be a difference in the percentage of depreciation by reason of the size and value of the animal. I would give the greater percentage of depreciation on the larger animal rather — upon the smaller one. That holds true as between the ages of the animals. The larger animal is naturally the older. You would get a greater depreciation upon the older animals if they have been running with the same herd and under the same conditions, and treated alike. As to why I put a depreciation of twenty-five dollars upon the yearlings when I do not make any greater depreciation upon the three-year-olds, in fixing this depreciation or loss I figure what the entire herd would average. In making my average I would say that this depreciation is twenty-five dollars per head average straight through on the entire shipment, regardless of the three-year-olds or yearlings. As a matter of fact there is a greater depreciation on three-year-olds than yearlings. That would be my opinion.

Q. Ten if *at* a matter of fact the depreciation upon the three-year-olds, by reason of the usage to which they have been subjected, would be twenty-five dollars, the depreciation on the yearlings would not be that much?

A. The depreciation in my opinion on those three-year-olds was considerably in excess of twenty-five dollars.

I stated that the depreciation upon the three-year-olds was twenty-five dollars. If the depreciation upon the three-year-olds, by reason of the usage to which *which* have been subjected, would be twenty-five dollars, the depreciation on the yearlings would not be that much, if that was settled upon as the depreciation.

I spoke of cattle having been injured by use of clubs, or something of that kind, and that I opened up a couple of them. Those were two of them that had died as a result of the treatment they had received at Great Falls. Those were not cattle that I opened up at Great Falls after they were dead. These two that were dead, we opened them up after they were dead. I refer to the time that I opened up the head to examine the jaw. I found broken bones in the jaw of those two, or in different parts of the head. However, I will say this: that those two head of cattle were not of the six head that died shortly after they arrived. Those cattle died late in the [fol. 75] fall and are not taken into consideration in this case. They are not part of the six that died later in the fall. They are not part of the six that we have taken into account that died shortly after arrival at Seville. Those two died late in the season and are not taken into account. Those two cattle did not die at Great Falls. I examined those cattle on our lease on the Blackfoot Reservation, and those two cattle in particular died on the Black-foot Reservation. They died late in the fall. They died late that fall and after they had died I opened up the jaw and examined it and found some broken. I found the broken bones on the face, those bones running down the face of the animals and across the nose.

I arrived at Great Falls on the nineteenth, in the morning on train No. 44. Some cattle died at Great Falls after my arrival, and I saw them. I saw some of those cattle before they died. I saw them when they were suffering from the effects of whatever it was that caused the death. I did not take the temperature of some of them, I saw it taken. These cattle that I saw which died had no other symptoms other than that they died of heat prostration. The cattle were lying there prostrate from the heat. As to what I observed about them that was not normal, aside from the fact that they had a high temperature, and what there was about them that exhibited suffering; they were lying there panting, having great difficulty in breathing. Some of them had their tongues out. Other than that I would not observe any other symptoms. As to whether they had a docile or a fighting disposition, they were fighting; they would be on the fight if they were able to get up and fight, many of them. I have shipped a great many cattle in my experience, and I have shipped in carload lots and train lots. As a matter of fact, in a shipment of cattle upon a railroad there are necessarily more or less delays, by reason of changing cars at division points and by meeting or waiting for trains. It is not an unusual thing for a stock train to stop twenty-five or thirty minutes on those occasions. Not being a railroad man, I cannot say as to whether I would consider those inevitable incidents in transportation, but it has been my observation that as a rule those things occur at the division points. At the division points they usually change cars, and that involves changing the engine and caboose. I understand that the new conductor has to check up on his way-bills and on the cars. I understand that under the provisions of law the engineer must try out his safety appliances and air-brakes. As a matter of fact, from my experience it is a fact that at division points that usually takes from fifty minutes to an hour and twenty minutes, or hour and a half, to go through this process. I have known of it being done at a division point in fifteen minutes. That is a rare exception. Even though it may be extremely warm weather, in the summertime, a shipment of cattle will endure standing on the tracks for an hour or so, if they are in good condition, without injury. If it happens that they are at a point where there is plenty of circulation and ventilation they will not suffer. I am familiar with the climatic conditions in Wyoming and Montana. I recognize [fol. 76] the fact that as a usual thing the evenings are cool here in Montana. Ordinarily cattle, if they are properly loaded and are in good condition and have not already been upon the train an excessive length of time, will not suffer during the night by reason of heat, if they are allowed to stand. I should say that if the temperature is, for instance anywhere from fifty-five to seventy degrees, that they will endure all right. Ordinarily they may be handled at that temperature.

Q. And even though cattle may have been suffering from heat during the preceding day, if they have stood up all right until eleven o'clock at night and air is cool that night they would revive, would then not?

A. I never seen them but what they were in fairly good condition; I do not know as to reviving.

Q. Well, if they have not been prostrated by the heat and they experience a change of temperature whereby it becomes cooler, from fifty-five to seventy degrees, in the evening they overcome whatever effects they may have suffered from in the daytime, do they not?

A. I presume they would. I have never seen them suffering from heat prostration.

Q. Assuming the case here in Montana where the cattle are upon the train, properly loaded, in good condition, and it is in the middle of the night and the evening is cool and they commence to go down, you would ascribe it to something else than heat prostration, would you not?

A. I never observed a condition of that kind.

If all the conditions were normal and such a condition as that would result I would lay it to something else than the heat.

Q. That is what I am referring to, if the conditions were normal.

A. All conditions were normal.

If I would suppose that the cattle had not been in the habit of feeding upon salt sage, and just before loading made a fill of salt sage, I would not say from my observation that they tended to intensify their thirst. As to whether it is a fact that salt sage contains that saline quality which is a substitute for salt in food, I am not qualified to express an opinion of that kind. As to whether I have never had any experience of that kind, I have had experience in loading cattle off of salt sage feed. I have done that in the hot summer months. I have done that when cattle have not been in the habit of feeding on salt sage and make a fill of salt sage just before loading. I do not know as you would call it a fill, but I have brought them in off of a range that was grass range and brought them in on a salt sage country and let them graze during the night and then loaded them the next morning, in other words let them fill off of a salt sage country. In my experience of that kind I have never observed any disturbance in the digestive apparatus of the cattle from feeding off of a salt sage country. I have observed that when they have been on a grass range and had a fill from salt sage country before loading. They would graze off of the salt sage [fol. 77] country perhaps a day before loading. It is a fact that the ability of cattle to stand up against the heat of a hot summer day depends a whole lot upon their condition.

Q. If, as a matter of fact, for two or three days they have been driven rapidly over a range that furnished rather insufficient feed and without opportunity to get a fill and have been driven very rapidly, and then just before loading for several hours have been milled around in cutting and in loading, would not that have some effect upon their ability to stand the extreme heat of a hot summer day?

Mr. Enterline: That is objected to as incompetent, and not predicated upon any evidence in the case.

By the Court: Nothing has developed from the evidence so far to justify that.

Mr. Reynolds: Our evidence is not in yet and I submit that we have a right to ask him upon our theory of the case.

By the Court: Overruled.

(Question read.)

A. It depends upon what you call rapid driving. If the cattle were put through on a trot——

Q. But I mean faster than they ought to be driven for their own good?

A. If the cattle are put through on a trot, or run, for three days and then milled I expect it would be pretty serious with them.

The seriousness of it would depend some upon the extent that that had been done. With regard to watering cattle before you load them, it is not a question upon which experienced cattle men disagree.

Q. Isn't it a fact that many experienced cattle men will feed and water from three to four hours before loading, before commencing to load?

A. Feed and water for three or four hours just prior to loading?

Q. That is, I do not mean feed and water for three or four hours but I mean at a period three or four hours before loading, will they not give them feed and water?

A. Well, they usually give them water and feed and probably would do that if they were forced to for stress of time or something of that sort.

Q. But I mean as a practice adopted by other good shippers in your immediate vicinity?

A. I do not think so.

Overloading will not necessarily tend to cause heating.

Q. If they are overloaded does that not reduce the amount of air space that they have in the car?

A. It depends entirely upon the weather.

The more there are in the car the warmer they will be, I should think. If they are overloaded in the summertime it is not necessarily apt to prostrate them. I cannot say that they would necessarily be likely to do so. It would increase the probability, or possibility of their becoming prostrated by heat in the summertime.

Five or six men ought to load a shipment such as this very nicely. [fol. 78] Ordinarily in my shipments of cattle I always send along a caretaker or custodian, and his duties are to look after the cattle while enroute. As to whether ordinarily I send in a shipment as large as this more than one man, I usually send one man to a shipment of that size. I do not usually send more than one man.

Q. In your judgment, is one man sufficiently able to handle a shipment of that kind if anything goes wrong?

A. If anything goes wrong in what particular?

Q. Well, if they get down in the cars to any particular extent, or if they have to unload them for any cause?

A. One caretaker is sufficient to go with a train of cattle under general circumstances, a train of that size.

It does make some difference whether he is an experienced cattle man or not. If the caretakers are inexperienced I would not necessarily want more than if they were experienced. It does not make such a great deal of difference. As a rule, an inexperienced man would do just about as well as an experienced man. As to how many cattle ordinarily I load to the car, thirty-six foot car; it depends upon the size and class of cattle. The larger they are less number should be loaded. As to how the class of cattle affect the number of head loaded; we designate that usually by ages, that is the older they are the less number. That also reflects itself in the size. Supposing I have cattle weighing a thousand to eleven hundred pounds. I would put twenty-four to twenty-eight head of cattle that size in a thirty-six foot car in the summertime. I would qualify that by saying that it depends upon the length of run that they are to make. The longer the run the less number possibly would be in the car, posibly would reduce it slightly. Supposing I had a run that will take approximately thirty-six hours, as to how much difference that would make in the number I would put in the car, I would say I would load probably two or three more cattle. I would load up to twenty-eight and as high as thirty head of cattle. If the run was to be longer than that I would reduce in proportion to the length of the run slightly.

Q. You would not have them on the car more than thirty-six hours either way, would you?

A. Well, the longer they are in transit they would become more tired.

I sold these cattle in the fall of 1918. I sold some of these cattle in the fall of 1918 in Chicago. I do not recall how many of them I sold of this particular herd. I do not recall how many of this particular herd was in this shipment that went to Chicago, but not a great many. As to whether it is a fact that before I shipped them to Chicago that fall that I made an estimate of the average weight on these cattle of thirteen hundred and fifty pounds; I did not make an estimate on this particular bunch of cattle of any such weight. As to whether I made such an estimate to Mr. Brown, sometimes known as "Slim" Brown at the reservation; I possibly made an estimate, I do not recall what that estimate was on the shipment of cattle that went forward, but not on this particular shipment of [fol. 79] cattle. I know Mr. Brown. As I recall he was working with our wagon that fall in rounding up cattle for the shipment. It is not a fact that I said to Mr. Brown at that time, with respect to these particular cattle, that we expected to top the market with them, not with respect to these particular Pitchfork cattle. As to whether we had any other Pitchfork cattle on this range, this herd of cattle that came in on this train were straight Pitchfork and the only Pitchfork cattle that we had on this range. We did not bring in any more before that, not of Pitchfork cattle; and we did not have any before.

Q. As a matter of fact, you had a very large range at Wyoming, did you not?

A. We have a range at Wyoming, yes sir.

Q. That is, you and Mr. Phelps and the Galbraeth Cattle Company?

A. I am not interested in Mr. Phelps' range in Wyoming.

It is not a fact that these cattle were shipped from Wyoming to the reservation for the reason that the range in Wyoming there was getting pretty slim; and it is not necessarily a fact that the range conditions on the reservation were much better. I do not think that it was possibly not necessarily the fact, and that such was the fact.

Redirect examination of Russell Thorpe by Mr. Enterline:

I was asked on cross-examination about a caretaker who goes with the animals in transit. In case of cattle getting down the caretaker is expected to get them up. The method of doing that is by using a prod pole and trying to get them on their feet, get them up. It does not require any particular skill to do that—punch an animal with a prod pole.

Q. Now, you were asked on cross-examination, Mr. Thorpe, about the values per head. When you gave the estimate on direct examination were you averaging up on the animals, or more particularly specifying when you said a loss of twenty-five dollars per head?

A. On the average.

Mr. Veazey: Well, that is contray to the witness' testimony.

By the Court: Well, we will not argue it now Mr. Veazey.

In fixing the market value at the times that I was asked, the fair market value, that was fixed on a reasonable buying and selling basis.

J. D. Watson, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is J. D. Watson. My place of residence is Lethbridge, Alberta. I am engaged in the ranching business and cattle-buying business with the Knight-Watson Ranch Company. As to the number of years' experience which I have had in the cattle business, I have been on the range all my life and been in the buying business [fol. 80] ever since I was twenty-one years old. I am forty-seven years old now.

Q. Are you connected with any cattle companies that are engaged, and have been in 1917 and prior thereto, in the shipment and buying and selling of cattle?

A. With the Knight-Watson men and looking after shipments for the Matadors.

In the year 1917 only three or four trains of the cattle of the Matador Company were handled through me, as I happened to be where they could get to me to look after those trains. During that year I looked after or supervised the shipment of around sixty thousand head of cattle. We shipped them from Texas and from Mantana and South Dakota. In the month of July, 1917, and along about the fifteenth, sixteenth and seventeenth of that month I was at Great Falls, Montana. At that time a company with which I was connected was handling or shipping cattle in that direction. They shipped them from points in Texas there at the time, and to Harlem, Montana. Those shipments went over the Great Northern railway from Mossmain up through Great Falls. At that time I did not learn of the shipment being made by the plaintiff here until after they landed in Great Falls. I was there the fifteenth, sixteenth and seventeenth. On the eighteenth I went to Helena and came around to Billings that morning, and the eighteenth I was here. Prior to the time that I left Great Falls some of my shipment of cattle had arrived at Great Falls. There was one train went through Great Falls; it did not stop there. While that train of cattle were there I interviewed the dispatcher in reference to letting the cattle stand on the tracks. Prior to that time I had experience and knew the effect of letting cattle stand on the tracks during the hot weather. I know what effect that has. At that time it was exceptionally hot weather and I told the dispatcher of this defendant company that I wanted movements on our cattle as fast as I could get them owing to that fact. At that time my cattle were standing on a side-track at Great Falls. They were moved. The condition of the weather at that time as I remember it was very hot, sultry. Assuming in this shipment that is under investigation here that they were left standing seven hours, from eleven o'clock one night until about six thirty the next morning, during the time of hot weather and a hot night and then they were started enroute and stopped at one time near a cut where there was no wind or air stirring, cut on one side and cottonwood trees on the other, where there was apparently no circulation of air, and kept there for more than an hour at the very time you were making shipment there, as to what effect that would have on the cattle; I would say that owing to the exceptional hot weather it would certainly have an effect upon them; they would be liable to get down and liable to die for want of circulation and want of air. If during that same hot weather the cars had been kept in motion form time to time, or the train had been kept in motion, as to what I would say about its having any ill-effect, the hot weather, on the cattle. I would say that any motion — start is a circulation through the cars and would help [fol. 81] them. In all my shipments of thousands of head of cattle which I superintended and shipped, where the cars were kept in motion I did not have any trouble; we never had any trouble where we had a good run.

One of my shipments was there at Great Falls and another coming after it.

Q. Now then, during your experience, Mr. Watson, in the shipment of cattle, assuming that a consignment of say nine hundred and eighty-four head, and you understand these are ordinary livestock, range stock—you are familiar with that class of cattle——

A. Yes, sir.

Now, assuming that they were watered say the night before they were loaded along from four until seven o'clock and passed over a ditch the next morning and then were loaded along from ten to three o'clock the next day. I would say that it would be the ordinary method in which cattle are shipped. I have shipped from all these parts and Texas and Montana and South Dakota, as I said. I have been doing that for twenty-six years. An estimate of the yearly shipments of cattle with which I had business transactions in the handling of them would be from ten to sixty or seventy thousand. That included range stock, mostly all range stock, western cattle.

Cross-examination of J. D. Watson by Mr. Veazey:

I saw the dispatcher and told him that the weather was hot and I would like to have my train kept moving.

Redirect examination of J. D. Watson by Mr. Enterling:

I think it was along about noon that I told him, of the day I left there, the seventeenth. I think I was getting ready to take tha*a* Helena train if I remember.

By the Court: About noon of the seventeenth.

A. I think so, but I do not just remember.

I would not be positive as to what time, but I know I went over in the morning; I am not positive as to whether it was that day or sometime before, I would not be sure. We were discussing the shipment from the fifteenth, I think, up to the seventeenth.

Recross-examination of J. D. Watson by Mr. Veazey:

A cattle man always likes to have his stock moving as much as he can, and at the same time the reasonable stockman realizes that there are times when it is necessary to stop the train for some time. At terminals for instance where it is necessary to inspect the train and to change engines it is necessary to make a stop varying from say thirty-five minutes to an hour and a half; but it would be according to the fight that you put up before you started your train. The trainmen generally do the best they can. I was asked a question as regards what would be the effect on cattle if they were loaded [fol. 82] and then placed in transit, were stopped seven hours after eleven o'clock at night on a hot night and afterwards stopped at a cut where there was a sidehill on one side and cottonwood trees on the other, where ventilation would not get through, and I said it might have an effect on them and it might kill them. The effect which would be produced upon them would depend upon whether or not they were in good condition at the time of loading, and upon how hot the night was. So that my answer to the question would depend upon my assuming that the night was hot. That is what I was asked. Now, getting away from this case, as to whether it is true or not that if cattle are not in good shipping condition at the time of loading that they might not be able to stand hot weather, where they could if they were in good condition; I would say that would be absolutely true in any case of anything.

Q. And if they were overloaded in the car, that would be a contributing cause that would make it unlikely that they would be able to stand the ordinary transit in hot weather?

A. I could not say that ordinary transit—if they were handled ordinarily—the ordinary shipment goes through generally all right.

Q. Even though they were overloaded?

A. Well, on shipments of not too great a distance.

I would certainly say that in summer time the matter of being careful about not overloading was more important than in cooler weather. I would not say underload if the weather was very hot; I would say we would load an average load. As to whether I would be very careful not to put a full load in, I would not overload.

My opinion as regards watering, whether I would not in hot summer weather want the cattle to have water a few hours before they were loaded on the cars, would all depend on how the cattle came in. If the cattle had been off water a long time why we might delay the loading to water them and then—the way we would handle our cattle, we would delay it again, so that they would not be loaded absolutely full of water. The number of hours which I would endeavor to water them before loading would all depend. If it was a night drive that they came in we would just as soon load. We generally pen our cattle at night and try to start loading in the morning. I would figure that anywhere from six to ten or twelve hours should elapse in the morning before the animals should be loaded. That would be true ordinarily.

Q. If, on the other hand, the weather was extremely hot, would you not cut down that period to not to exceed four hours before loading?

A. Well, if cattle are dry they will generally water themeslves if they get a chance at it.

Q. Now, pardon me, that is really not responsive to the question.

A. Well, excuse me then sir.

It is not a fact if the weather is very hot I would want them watered or well watered four or five hours before loading. I would not want them to go on the cars with a big fill in them no time. As to whether [fol. 83] they would do that if they were watered four or five hours before loading, I would say if they were just held they probably would; they would hold the water quite a while.

In the question propounded to me I was asked to assume that they were watered before four and seven of the night before loading, and on the morning before loading in the cars they were trailed across a canal. As to whether I assumed that they drank water from that canal, I would say that if they were dry they would drink; you could not hold them off, and I assumed that they did.

Q. And, on the other hand, if they were driven right across and kept from drinking and given no opportunity to drink water your answer would be different?

A. I do not just get you.

Q. If as a matter of fact, they were given no opportunity to water at the canal, but were driven right straight across, then your answer would be different?

A. If they were started early in the morning and went right to the canal I would think it would be all right; that is the way I would expect to load them.

Q. Suppose that they started for the canal at four or five o'clock in the morning, you would assume then that they would be loaded along about seven?

A. Well, they ought to get started to load anywhere from seven to ten. It takes a few hours to handle a train of cattle.

As to whether I would make no difference in my watering practice in the summertime than in any other time; I would certainly make some difference in the summertime, but I do not make any great difference in loading—in your watering and loading. As to what difference I would make as regards the time before loading in very hot summer weather that the cattle should be given water as compared to the ordinary fall weather; I would give some little difference but not a great deal of difference; there would be some difference of course. As to what harm it does to give the cattle a good fill of water within four or five hours of loading; the first time you pen your cattle and load them and load them full the fright has a great deal to do with the shrink, and if they are loaded full they shrink and it is just like turning a horse loose that is full; it is liable to make him sick. If they are loaded on this train the fright would effect them a good deal—I mean if they are loaded on any train—I mean on any train that you load a full train of cattle; a train of cattle full of water.

Q. Now, then, assuming that some animals are loaded sometime in the afternoon,—that is finished sometime between three and four, and the loading began sometime between nine and ten o'clock, and they have a normal movement from Cody to Mossmain and at Mossmain they arrive at eleven o'clock and stand there on the siding from eleven o'clock until about five o'clock in the morning, we will say six or seven hours; but I want you to assume aside from this case that there are no box cars or other cars on either side of this train, I want you to assume contrary to the plaintiff's testimony that the track is a sidetrack adjoining a main line, and I want you to assume further that the night is cool, running from fifty to seventy [fol. 84] degrees, not lower than fifty nor higher than seventy degrees, and while they are standing there during that seven-hour period the animals begin going down so that at the end of the seven-hour period the cattle are unable—some of them are unable to get up and they look in bad shape; would you say that that was due wholly to the delay there, or that the—there must have been something in the condition or in the loading of them, or in the watering of them which caused them to be unable to stand the journey in transit from Cody to Mossmain, which I will assume was very hot weather, but bear in mind I am assuming that the night in Mossmain is cool, within the degrees stated. Now, what I am asking you to do is to take our side, assuming that we will be able to show that, contrary to the plaintiff's case. Now, if we establish those things contrary to what the plaintiff says, would not it be your opinion that then there was probably something the matter with the watering or with the overloading, or something wrong with the condition of the cattle which you did not know.

A. Well, if I understand your question, you want me to assume that these cattle were in bad shape.

Q. No, I want you to assume the facts that I have stated.

A. If I am out of line just straighten me.

Q. I want you to assume that the plaintiff is wrong with regard to the facts that he has testified?

A. I can't do that.

Mr. Enterline: I object to that as an incompetent question, to assume anybody is wrong.

By the Court: That hypothetical question, as stated, and this question is all right. Finish your last question.

Q. Are you able to assume that what the plaintiff testifies to here may be incorrect?

A. Why, I was not there. I do not know anything about that.

By the Court: Counsel is only asking you to assume a certain state of facts, irrespective of this case.

A. All right, go ahead.

I am able to assume a state of facts in my mind inconsistent with what the plaintiff has stated in this case. They have said that the cattle were left at Mossmain for seven hours between rows of standing box cars with the weather hot. Assuming that they were standing on a sidetrack next to a main line, with no cars on either side of them, and assuming that the night was cool, the temperature varying we will say not less than fifty degrees and as high as seventy degrees; there is nothing in that condition which would cause prostration of cattle, not up to that point. If the conditions were as stated, that delay, although the stockmen would not like it, would not cause the cattle to go down. If those facts are true, if when the Great Northern Railway Company received this stock at Mossmain they received them at eleven o'clock and then took them out at five o'clock and moved them rapidly to Judith Gap and during this interval at Mossmain the night was cool, with a temperature from [fol. 85] fifty to seventy degrees, and the cattle began going down and were in bad shape by five o'clock and were in quite bad shape at Judith Gap; then I would say that if those things were true and there were no cars on the side, I would have to look to something other than the delay as the cause of the animals going down.

JOHN GALBRAETH, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is John Gilbraeth. I live at Browning, Montana; I have lived there twenty-five years. I am the vice president of the Galbraeth Cattle company, one of the plaintiffs in this cuit. I have had experience in the cattle business I would say all my life, that would be for the last twenty or twenty-five years. I have had that experience upon the Blackfoot Indian Reservation and other places. I had some experience in Texas. I was acquainted with and was present when this particular shipment was received at Seville along in July, 1917. I had never seen them prior to that time. I was there as one of the receiving parties for the plaintiff.

Q. What condition did you find the cattle in when you saw them there at Seville, those that were received there?

A. Well, they were brought there and classified and counted out and classified out there.

As to their physical condition, as to whether they were strong and healthy looking, or otherwise, they were a delicate looking bunch of cattle; showed signs of hard treatment, rough usage.

Q. And did you observe them after that, Mr. Galbraeth, while you had them there?

A. These cattle came out of a car and we counted them out, classified them as they came out, and among them was forty head of cattle that I objected to taking.

As to the condition of these forty head, their heads were all swollen up and big noses and big mouths and big jaws. As to whether I afterwards cut open any of them to notice what the condition was, I could see they were bruised up; I did not have to cut them open. I saw some forty head that were permanently injured. As to what was the fact as to whether they improved in their condition rapidly to get back to normal condition, or whether it was a slow and long process; they never made any improvement. Probably some did in eighteen months afterwards—some of the old ones. We held some over a year and figured on turning some of them that fall, and did not turn any of them. Along from the eighteenth of July until the twenty-fifth, 1917, I was acquainted with the fair and reasonable market value of all these classes of cattle that were received there by the plaintiffs. The fair market value of the cattle, of the three-year-olds, if they had arrived in the ordinary condition that cattle would have arrived, had it not been for the treatment which they did receive, would have been not less than a hundred dollars a head. If the two-year-olds had arrived in the ordinary condition as cattle would arrive in a shipment such as is under in- [fol. 86] vestigation here, at the same time, the fair market value of them would have been not less than sixty dollars a head.

Q. And what would have been the fair and reasonable market value of the one-year-olds, or yearlings, if they had arrived in the ordinary condition that cattle would arrive in a shipment made the distance that these cattle were shipped, had it not been for any unusual occurrences?

A. That is the two-year-olds?

Q. The one-year-olds.

A. I thought you asked me the two-year-olds before.

Q. The one-year-olds you fixed at a value of what?

A. Sixty dollars.

The two-year-olds were fixed at a value of eighty dollars. I would say that the average depreciation in value per head in the condition in which they were received would be about twenty-five dollars a head all the way through. I have been in the cattle business and on the range generally for the last twenty years. I have heard the testimony as to how these cattle were loaded and shipped at Cody, that they were brought and watered along about seven o'clock on the fifteenth day of July and then were loaded on the morning of the sixteenth from about ten o'clock in the morning until about three. I have had experience in shipping cattle. As to whether that is the ordinary and usual manner for loading cattle by cattle men who make shipments, I would say that is the proper way.

Cross-examination of John Galbraeth by Mr. Reynolds:

I would say that the value of the three-year-olds at the time they reached Seville in the condition in which they actually were would be about fifty dollars or sixty dollars, somewhere along there, if I had to buy them, about fifty or sixty dollars a head. I think they were worth just about a little over half what they would be normally. The yearlings had a chance to outgrow the treatment they went through and the three-year-olds did not. I do not think that the loss would be so big on the yearlings. You did hear me say on direct examination that it was the large ones that improved, but they did not ask me if the little ones improved. The small ones certainly did improve, they grew, they recuperated faster than the old ones did. I think the yearlings were worth about thirty dollars a head at the time they reached Seville in the condition in which they actually were at that time.

Q. Well, you have increased your average then considerable, haven't you? As I understood it you put a valuation of sixty dollars upon the yearlings if they had been in normal condition, if they had arrived there, and in the condition they actually arrived they were worth thirty dollars.

A. Well, we agreed that twenty-five dollars was a fair estimate of the damage per head.

I agreed on that with myself. I agreed with myself. I talked this over with Mr. Phelps and Mr. Thorpe and all of us agreed that the [fol. 87] damage would be twenty-five dollars a head on the average, but I honestly believed that the one-year-olds were worth about thirty dollars when they got there, and I honestly believed that they would have been worth about sixty dollars if it had not been for the hardship through which they went. I honestly believed that the three-year-olds were worth about fifty or sixty dollars a head when they got there, and they would have been worth a hundred dollars if it had not been for the bad treatment. Naturally, when they clubbed the cattle in the cars they could hit the biggest ones easy, and that is where the defect was. I spoke of forty of them, but there was forty that was in bad condition.

Q. You have already testified that the depreciation on the older cattle would be greater than on the young. Now how do you explain that you put a higher price on the younger class than you do on the older class, percentage of depreciation?

A. Yes sir.

Q. How do you explain that?

A. Well, I have tried to explain it.

Q. Simply because some of them got knocked on the head with a club, is that it?

A. Well, they were larger cattle and worth more money.

Q. As a matter of fact, when those cattle reached Seville there was only one of them that had an enlarged head, was there not?

A. Was you there?

Q. I am asking you.

A. Well, I told you forty head; I ain't lying about it.

That is absolutely my statement and it is correct. Some of these cattle never made any improvement for eighteen months. That was true of a very few of the herd. I could not say about how many. I do not know just how many there was. I mean that a very few of them made an improvement, and the rest of them did not improve enough to go on the market in the fall of 1918. I do not know just how many of those cattle we shipped in 1918. It is not a fact that we shipped a very large percentage of them. I do not know what these particular cattle weighed when they were shipped.

Q. They weighed pretty close to thirteen hundred pounds, or more, did they not?

A. These particular cattle?

Q. Yes sir.

A. They were shipped along with other cattle that had not had abuse that were of the same age and older. I suppose the train would average out probably thirteen hundred pounds.

C. F. Milsap, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is C. F. Milsap. My place of residence is Cutbank, Montana. I am in the employ of the Galbraeth Cattle Company. I [fol. 88] have had twenty years' experience in handling and being around cattle. I was not at Great Falls when this consignment of cattle which is under investigation here was unloaded there. I was in Great Falls but I did not witness the unloading. I went to assist there on the morning of the nineteenth. I remained in their employment until afterwards when they were taken out, and afterwards worked for the Galbraeth Cattle Company where these cattle were. When I was there on the nineteenth of July, 1917, I observed that they were in very bad condition. The cattle were stricken with what appeared to me to be heat apoplexy, or prostrated by the heat. They were bruised about the head, a number of them, and otherwise appeared to have been treated terribly. Some of them were lying around dead while I was there. When they were taken away from there to Seville I accompanied them to Seville and remained with them afterwards. The improvement, when they got to the ranch, was very slow; they did not pick up as cattle should to have been shipped no further than they had. I have not remained in the employ of the Galbraeth Cattle Company ever since. I think I remained in their employ until about the first of December that fall; I then went to Spokane to business school that same fall.

Cross-examination of C. F. Milsap by Mr. Veazey:

I am now in the employ of the Galbraeth Cattle Company.

Q. Who came with you to Great Falls on the nineteenth?

A. From Great Falls to Seville you mean?

Q. Well, who came down from wherever you were to Great Falls; did Mr. Thorpe come down with you?

A. I was in Great Falls at the time these cattle arrived there.

Mr. Thorpe, Mr. Wright, Otto Cassidy, Joe Latusky, and a fellow whose name was Carl, and whose last name I do not remember, were assisting in the loading of the cattle there. Those were all employees of the Galbraeth Cattle Company; they were the ones that were in charge of the loading, under Mr. Thorpe's direction, of the cattle out of Great Falls for Seville, and they accompanied the train to Seville. When I saw the cattle at Great Falls I would describe their condition as being in bad condition, heat apoplexy or prostrated by heat. I saw a number of them with bruises on the head and they looked terrible. That applies to the entire herd, you would say it applied to the entire herd.

Q. The balance of the herd on the nineteenth when you loaded them out looked terrible?

A. We did not load out on the nineteenth.

As near as I remember we loaded about the evening of the twenty-first. At the time we loaded out the balance of the herd looked decidedly better. They were full of grass and water and of course that made a difference. I would say decidedly that they continued to look terrible, so that it is true that at the time we loaded them out on the cars for Seville they still looked terrible. I would say that they did. Any experienced stockman would know that they had [fol. 89] gone through some terrible ordeal. If an inexperienced stockman had been around stock any at all I would say that he would have noticed it. When we unloaded them at Seville we grazed them there that evening and left with them the next morning for the lease. I should say that the lease was eighteen miles away. It took us two days to make that drive. After that we turned them loose on the lease. Otto Cassidy, Bill Hall, Nance, a gentleman by the name of

Nance, myself and two others, whose names I do not remember, accompanied them on that trip to the lease. George Reynolds was the lookout man on the trip there. He was with the herd part of the time and part of the time going ahead looking for the best road, etc., where the best course was. He was the foreman. I do not know where he is. He is not in the employ of the Galbraeth Cattle Company any longer to my knowledge.

E. B. Ryan, a witness called upon behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is E. B. Ryan. I live at Billings, Montana. I am engaged in the livestock business. I have had experience in the livestock business about all my life. I was about twenty-two years on the range and trails in the cattle business in Mexico, Arizona, Texas, Indian Territory, Kansas, Utah, Idaho, Montana, and Wyoming. During that time, in my years of experience, I became acquainted with the method of shipping cattle and the effect upon shipment made in delays and so on, also with the values of cattle. I saw part of these cattle that are in controversy in this suit that have been described here on the Pitchfork Ranch. That was before they were shipped; that was either September or October of the year before they came up. I have heard in this case that there were some nine hundred and eighty-four in the shipment that was made.

Q. Now, was you acquainted with the values of those cattle, that kind of cattle, two and three-year-olds, and one-year-olds, along from about July eighteenth to twenty-fifth at Seville, Montana, in 1917?

A. I know about the value here.

Q. Well, that won't do us any good, Mr. Ryan, unless you are acquainted with the——

A. I knew the general value in Montana.

Assuming that the cattle of this shipment of nine hundred and eighty-four of one and two and three-year-olds of these cattle arrived in the condition that they ordinarily would arrive in a shipment from Cody to Seville, I would put a reasonable market value per head on the three-year-olds of one hundred dollars; a reasonable value of about eighty dollars on the two-year-olds and a reasonable market value on the yearlings of fifty-five to fifty-seven and one-half dollars. I know where Cody is and the range over there. I am acquainted with all the conditions over there. Assuming that these nine hundred and eight-four head of cattle were brought to Cody on a three days' drive and watered every day and arrived at Cody about two miles or so from the station where they were [fol. 90] loaded, and watered along from four to seven o'clock the next morning, and were not watered except as an animal wanted to take water as he went over the ditch there, and were loaded from nine to three o'clock, I would say that was the proper method of loading and the ordinary method. That is what I did at Cody on two different occasions. In the course of my experience I would say that I have shipped approximately each season four or five hundred cars of cattle. Taking a shipment such as has been described, a train of thirty-two cars, and let that train stand say in the hot sun for over an hour where there is no air stirring, ordinarily under that situation your cattle commence to go down. Where they are kept standing on the track during a hot night from eleven o'clock until half past six the next morning the effect of that would be that the cattle would go down all the time, and as it goes on it gets worse.

Cross-examination of E. B. Ryan by Mr. Reynolds:

Most Montana nights are usually cool. The ordinary cool Montana night from eleven o'clock to five in the morning ought not affect them much, but they would get tired and lie down.

Q. Well, if they got tired they would lie down anyhow, would they not?

A. If they were kept running, their train kept running, they could brace themselves probably.

They would not suffer from the heat proposition in a Montana night. In my shipping experience I have shipped over various roads to different points for long distances. It is not an unusual thing that stops are made anywhere from half an hour to an hour at various points in transit on a trip. If cattle are in good condition and it is a hot summer day and they do not stand for more than an hour upon the track and there is some air stirring they ordinarily will not suffer. Your caretaker has got to look after them all the time and not let them get down. It is not a common thing in the shipment of cars for several cattle to get down under ordinary circumstances, not if they ship them good. It is nothing unusual in a normal shipment to find some that will get down on a hot summer day. I would say that I do not expect it at any time, but if they are in good condition they ought to stand the ordinary hot weather in the summertime if they are not kept standing too long in one place in the hot sun. I would not consider that an hour delay was anything unusual in transit in the ordinary shipment at division points. Now they do get more or less delays usually in stopping to meet trains. Occasionally they do have to make a change of brass on the wheels, and that usually takes fifteen minutes to half an hour. All those things are what I would call just the ordinary incidents to a train of livestock.

I saw all these cattle on the Pitchfork ranch the fall before they were shipped. They were two-year-old steers when I saw them. They were the ones that were three-year-olds in 1917. At that time I saw all the two-year-olds that they had. I would say that they were a fine quality of stock; I tried to buy them. The breed of the [fol. 91] cattle were Herfords. A fair estimate of the weight of those cattle would depend on whether they were three-year-olds. At the time I saw them I figured that they would weigh around eight hundred, or eight and a half—that is when they were two-year-olds.

Q. How much would you expect them to put on the next year?

A. What time the next year?

Q. Well, we will say up to next July?

A. Well, they would lose some through the winter. I would figure them nine and a half to a thousand pounds the next July.

That is what I would think those cattle, the Pitchfork cattle, would weigh. In the hot summertime if I commenced to load at about half past ten in the forenoon, if I could water early in the morning and feed early in the morning, I would feed but I would not water.

Q. Well, if you should feed early in the morning and follow it with water and then wait four or five hours before loading, do you think that would be at all detrimental to them?

A. I would not give them water if there was any way to shut them off of it.

Q. Well, isn't that a point upon which livestockmen disagree?

A. I don't know of anybody disagreeing on it.

F. Kesselring, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is F. Kesselring. I live at Great Falls, Montana. I am a veterinarian by profession. I am a graduate of the Ohio State University. I graduated in the year 1908. Since that time I have been practicing my profession. I have been working for the United State Government, and up until 1916 in May. Before that from 1909 to 1915 until about in October in 1915 I worked for the United States Government, the Bureau of Animal Industry; and from that time I have been practicing. When I was working for the Government I was working at my profession. I worked at meat inspection in Chicago, and from that time I was a range man, working in Wyoming and Colorado and Tennessee. I came to Montana the thirteenth day of January, 1913. I did not locate in Great Falls; I was sent to Sweet Grass, Montana, by the Government. I have lived at Great Falls since May in 1916. I have been subpoenaed here as a witness by the defendant. I was called upon by Mr. Phelps, or someone to make an examination of some cattle that were in the yards at Great Falls along in July, 1917. I was called by Mr. Phelps. I went there the eighteenth day of July, 1917, at the request of Mr. L. G. Phelps, one of the plaintiffs in this suit. At that time I held a postmortem on one of the cattle that were lying around there in the yards. I took the temperature of this one animal, and read the thermometer of some others which were not taken by me. The temperature of the [fol. 92] one which I took was taken before it died. The temperature registered one hundr-d and eight. I saw the temperatures and read the temperatures of other animals whose temperatures were taken which were ranging anywhere from one hundred and three to one hundred and ten, and that was as high as a clinical thermometer will go, or as high as the thermometer would go that we had there at that time. I conducted a post-mortem on one, cut it open. I killed that animal. Before I killed the animal it was in a sort of com*m*atose condition; that is lying there with its head around to the side, like if any of you farmers have ever had milk fever in a cow after calving. That was the condition. When I cut it open I discovered that the bowels of the animal, the small intestines, were normal. I have made a memorandum at the time, from which I read as follows: "The heart normal, the lungs normal, anterior mediastinal lymph glands and posterior mediastinal lymph glands slightly congested." The anterior mediastinal and posterior mediastinal lymph glands are the lymph glands where the middle of the lungs comes together. Anterior means before and posterior means back. That gland, I said, was slightly congested. The spine was normal, and the rumen, one of the compartments of the stomach, contained not much food and the other compartments of the stomach, with the exception of the omasum, that is the rumen reticulum and abomasum, I found were dry. In the omasum I found quite a lot of dry food—what I found was dry. The rumen reticulum omasum and abomasum are compartments of the stomach. I read that dryness of the material in the stomach is due to the heat which this animal was carrying at the time of the post-mortem. The mesenteric lymph gland, that is the lymph gland of the intestinal tract, was slightly congested. The kidneys were normal, the liver was enlarged and the gall-bladder enlarged. The retal gland and the small intestines were normal. The blood was slightly thickened, a little bit more than normal. Taking into consideration that post-mortem and observing all the other cattle there and their temperatures, I came to the conclusion that heat apoplexy or heat stroke was what was the matter with the cattle. That was the cause of the death of those cattle that died in my opinion. I was there at that time probably two hours. I was there when other veterinarians opened up some of the animals. I observed and looked into the animals and I saw the condition they were in.

I opened the intestines in the one I operated on. My observation of the others that were cut open was that they were practically the same as the one that I opened. I saw the other animals there and noticed how they acted. I drew some conclusions or inferences from the actions of the animals. The animals were kind of excited; they had exhaustion and they was dull, and had a staggery gait; those that would try to get up, and they would have a sort of paralysis behind, fall over and lie there in a sort of com*m*atose condition, and a lot of them just died right there that way. I attributed that condition to the heat.

While I was there I took photographs showing the condition of the animals, some that were cut open and others lying there. I [fol. 93] took the pictures myself and had them enlarged. Plaintiff's Exhibits O-J, O-K, O-L, O-M, and O-N which you hand me are the photographs concerning which I have just testified, and which photographs were taken by me. They are photographs showing the yards there and the cattle that were lying there, and a correct reproduction of the situation there at that time, so far as they purport to represent.

Mr. Enterline: We offer them in evidence.

Mr. Veazy: We do not dispute in the case the fact that there were these deaths; we also do not dispute the fact in the case that Dr. Kesserling opened animals to make a post-mortem. The only object of these photographs would be that they would encumber the record and show carcasses lying around. Therefore, they are immaterial and tend only in a measure to mislead the jury. We think, therefore, that they are improper to submit to the jury. There is nothing that can be of interest in the way of submitting to the jury pictures of carcasses unless the object is to sort of horrify us all by pictures of carcasses lying around. The facts are admitted, and the pictures could have no other purpose.

Mr. Enterline: I intend to direct the doctor's attention to some of these animals, as to what it indicates right on these pictures.

By the Court: Overruled. Let them be received for whatever they are worth.

Mr. Veazy: We make the objection now severally as to the Exhibit O-J. I assume that objection is overruled.

By the Court: Yes.

Mr. Veazy: And then severally as to O-K for the same reason. I think the picture is erroneously marked "O. K."

By the Court: You want to make the same objection severally to each one of these exhibits?

Mr. Veazey: Yes.

By the Court: Very well, let the record show that the objection is overruled.

Which said exhibits were thereupon received in evidence and the same are by this reference made a part of this bill of exceptions.

Calling attention particularly to Exhibit O-L, there is something significant about the animal there in front. O-L shows a case of com*ma*, the condition which I described awhile ago—the very first steer here. During the course of my examination I was there every day practically. I would go out there maybe an hour or so and for an hour or two. I went out there every day while the cattle were there.

Q. And in what condition were they, Doctor, when you left there as to this excited condition that you have described?

A. Well, there was some of them that was left there, and of course I did not pay much attention to the ones that went out.

When I first went there I did not go over the entire herd; I went over the ones that were in the corral and outside of the corral, not the ones on the range. Besides the experience I have had in my pro- [fol. 94] fession I have been on the range. I was in Colorado and I worked on scab in Colorado.

Cross-examination of F. Kesselring by Mr. Veazey:

I opened the small intestine. I cut open the rumen. I found the condition of the intestine to be absolutely normal. I did not separate the membrane of the intestine; I took and cut it open just the same as we do in ordinary post mortem work.

Q. And after opening it up and laying it out you did not separate the membrane?

A. Well, there wasn't any use to separate the membrane, because that was clean. I found the heart normal.

The lungs were normal with the exception of the anterior and the posterior mediastinal lymph gland. The spine was normal. The rumen did not have much food in it; it was probably one-third full. The Omasum was dry; it was dry and red; it was naturally — bit hard due to the heat. I would not necessarily call it impacted. I found the kidneys normal. The liver was enlarged. The renal glands were slightly congested; the blood seemed to coagulate a little faster. Of course I did not pay much attention to the blood because I could not tell much about it at that time. The blood would thicken a little more rapidly than normal; it appeared that way to me at that time, but I did not make a close examination of the blood. The animals — were not dead were fighting, up and fighting. There were some of them fighting. Those that were in this com*m*atose condition were those that were practically dead. That com*m*atose condition comes before death. As regards those that were not very near dead at the time; they showed excitement and fighting dispositions and showed a disposition to get up on their feet and come after you when I approached them, and stagger and fall right over again. I think those animals later died. There was lots of them died afterwards.

Q. And those that died were those that you saw in this com*m*atose condition and those that you saw before a com*m*atose condition getting up and staggering?

A. Well, lots of those died too that would get up and fight you. I did not count the number of those that I saw in this com*m*atose condition. I was around there off and on every day while the cattle were there, some four or five days I reckon. The com*m*atose condition would come on only just before death. I was subpœnaed by the defendant to appear Monday. I diagnosed the condition as heat stroke, or heat prostration. I made that diagnosis on the fact that I did not find anything in the intestinal tract to call it anything else, and by the staggery—and by the symptoms which they showed there in the corral and outside the corral. Those are the symptoms which I have already given, the staggery gait, excitement, coma and high temperature.

Q. Could there not have been an inflammation in the intestines there without your finding it, an inflammation beneath the surface *beneath the surface* which you did not open up?

[fol. 95] A. That would require a microscopic examination of a section made of that intestinal tract to determine that. And furthermore there was no inflammation of the bowels or the lining of the bowels.

I am talking about the inside of the bowels. I am talking of the inside, or the mucous coat. I cut the intestine open, and that would show me the inside of the intestine. The coat of the intestine next to the mucous coat, which is the submucosa coat, was practically clear. It was not necessary in my opinion for me to take off the mucous membrane. If you had an inflammation of the intentinal tract at that time you would have your coloration of the small intestine showing on the outside, where any veterinarian with any eye could see the dark red or the black coloration from the intestinal tract due to what you call enteritis.

That would be a digestive disturbance. Comparing enteritis with heat stroke, the condition of the mouth of those animals was hot and dry. They were breathing hard. They were breathing hard and it was certainly a sort of suffocation that they were going through to get air into their lungs. It was hard or labored breathing. As to whether I noticed any of the animals indicating a symptom of gasping for breath, and being almost choked to get their breath; there was lots of them that had their mouths open and were breathing pretty rapidly, and it was my opinion that it was hard for them to breathe.

Q. But was there any actual suffocation of the animals, did the breathing go that far?

A. Well, I will tell you. When the breathing gets that far it just keeps on going and ends in death.

Q. Well, did it ever go as far as suffocation?

Q. Well, did it ever go as far as suffocation?

Q. Well, the animal can't breathe through its throat, you know what suffocation is?

A. Yes.

It went that far. The tongue of the animals was lolling to one side. There were some of them that did that. In heat stroke you can have the tongue lolling to one side.

Q. In a nervous disturbance you would not expect that?

A. You would have it, in the case of these cattle. You might have the tongue hanging out too in a nervouse condition. Of course it is to be described as to what nervousness would be.

Q. In a heat stroke you would have congestion of the lungs?

A. I do not think that a veterinary could tell if they would have a congestion upon a rapid post-mortem such as we took up there, just by killing the animals as was done up there, because it is too rapid, the post-mortem done too quick.

Mr. Veazey: I move to strike that answer as not responsive. The question simply was: Is congestion of the lungs found in a heat stroke.

By the Court: Overruled.

[fol. 96] Congestion of the lungs is a symptom of heat stroke. We find congestion of the lungs when we find heat stroke. That is not necessarily one of the characteristics symptoms of heat stroke. All the symptoms we have before us all point to the characteristic of heat stroke, that is your high temperature, etc.

Q. But I am asking you simply about the condition of the lungs, as to whether or not that is characteristic of heat stroke?

A. Well, I guess you can have congestion, yes.

Q. Isn't it the ordinary and usual symptom of heat stroke that you have congestion of the lung?

A. Well, you couldn't tell it at that time of post-mortem.

Some authors say that is the fact.

Q. Do you agree or disagree with those authors?

A. A person might find it if the post-mortem was conducted a couple of days afterwards, but not at the same time.

Q. Do you agree with the view that if an efficient postmortem is made the congestion of the lungs will be found there, if there was heat stroke?

A. I do not believe a man will find it in any of these cattle.

Q. If you will just get away from these cattle and assume that you did not see these cattle. Now, I want you to answer the question if you will as to whether or not if a post-mortem were made efficiently there would not be a congestion of the lungs if there was heat stroke?

A. You would find a congestion in there according to some authors, yes sir.

Q. Do you agree or disagree with those authors?

A. Well, you must take into consideration, Mr. Veazey, that these authors, or that author, probably held a post-mortem where he got his data at a later hour.

Mr. Veazey: Move to strike out the answer as not responsive.

By the Court: Strike it out.

Q. Do you, or do you not, agree with those authors?

A. Well, we have to agree with the authors.

I do agree that if a post-mortem is made a congestion of the lungs will be found if there is heat stroke.

Q. If there was heat stroke, would or would there not be an enlargement of the heart on the right side?

A. Well, authors say that there might or might not be. The authors say that the enlargement of the heart on the right side is the usual condition of the heart in heat stroke. I did not find any enlargement of the heart in my post-mortem. The authors say that the enlargement of the heart on the right side is the usual condition. It is true that in heat stroke there is no thickening of the blood. In this case, I say it appeared to me that there was thickening of the blood, but I did not make a close examination of it. I made the statement that it was not only thick, but thicker than normal. I made as careful an examination as we could under range conditions. As regards heat stroke and whether or not a typical symptom is congestion of the liver, I cannot say concerning that. Sweating as a [fol. 97] characteristic feature of heat stroke applies to horses. The author cites horses as a condition where they will have sweating in heat strokes. The diagnosis I made at the time was heat stroke. The weather was hot at the time; it was very warm. I took ample time to make my post-mortem. It was not as thorough a post-mortem examination as a person should make if he had access to any place to make a microscopic examination, and one thing another. You must take it on the range condition. This was about two miles outside the city limits of Great Falls. The stockyards are located about two miles outside the city limits. It is not true that my opinion that it was heat stroke is based on the assumption that the animals came in contact with severe heat. I did not know the condition: I did not know the pre-history of the case when I made my post-mortem. Afterwards I discussed the case with Dr. Knowles. He asked me for the symptoms that were found and I gave him some of them.

Q. And on reviewing those symptoms you considered the question of heat stroke or digestive disturbances?

A. He wanted digestive trouble but I could not agree that we would have intestinal trouble.

We discussed the symptoms and I gave him some of the symptoms but not all. I did mention to him this coagulation or thickening of the blood. I mentioned to him that I had found no congestion of the lungs.

Q. And you mention- to him also—or didn't you tell him that there was no com*ma* to those animals, and that a characteristic symptom of them was that, though they were sick, as soon as you came near them they would jump up and fight?

A. Mr. Veazey, that word "com*ma*" slipped my mind until I seen my pictures, and that brought that back to me.

That would not be a proposition where I have changed my mind. I have not changed my mind. I do not know whether it is true that to Dr. Knowles, when he was discussing with me the symptoms and trying to form his conclusions, I mentioned as a characteristic symptom that there was no com*ma* but that the animal would get up and fight. I cannot answer that question.

Q. Isn't it also true that in that discussion with Dr. Knowles where he was trying to find the symptoms and reach a conclusion that you advised that it was a characteristic symptom of those animals that the tongue, if it had been heat stroke, would have been lolling to one side, and that in this case the tongues of these animals did not loll to one side?

A. I did tell him that some of the tongues were lolling out and some was not.

Q. Those that were lolling out, would those be the dead ones?

A. I did not stay there to count them to see how many of those that died had their tongues hanging out.

I looked for that condition of lolling tongues. I would say that condition is characteristic of heat apoplexy or heat stroke.

Q. Would you say it is characteristic of those animals that were sick?

[fol. 98] A. The greater part of them showed the tongues lolling out. I do not remember whether it is true that to Dr. Knowles I said that it was not a characteristic condition of those animals that the tongue was lolling out.

Q. As the result of yours and Dr. Knowles' going over these symptoms, didn't you later change your opinion and reach the conclusion that it was not heat stroke?

A. I did not agree because he wanted gastro enteritis, and there was no gastro enteritis in those cattle.

I did not agree that this was not heat stroke. I do not have my original notes with me; I have only a copy. The original notes which I made are at home. I did not bring them with me because I did not think it was necessary. I did not bring the originals and brought a copy because the originals were nearly destroyed, all wrinkled up, been lying in the safe and one thing — another, and I made a copy of them. That is the explanation I give for not bringing the original notes. I had kept them in a safe and they were all doubled up and folded up and I put them into the safe and threw things on top of them for the last three or four years, and they are very much wrinkled.

Q. But you kept them in a safe?

A. Well, part of the time, Mr. Veazey——

Mr. Enterline: He said so. I object to it as repetition.

Q. And you haven't them here at this time?

Mr. Enterline: I object to that as repetition.

E. D. Nash, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is E. D. Nash. I live in Helena, Montana. My profession is veterinarian. I am Deputy State Veterinarian of Montana. I am graduate of Grand Rapids Veterinarian College, Grand Rapids, Michigan. I graduated in the year 1900. I have practiced my profession since that time. I have been Deputy State Veterinarian since my appointment in the first part of June, 1900. I graduated about a month before that time. I was appointed very shortly after I graduated. I have been Deputy State Veterinarian ever since in the state of Montana.

Q. Doctor, were you called upon to go to Great Falls and make an examination of cattle that were in the yards there of the Phelps and Galbraeth Cattle Company?

A. I received a wire from the State Veterinarian, Dr. Knowles rather, that there were cattle dying in the yards there. I might say that I was in the vicinity of Great Falls at that time.

I received instructions from my principal to go there. After receiving my instructions I went to Great Falls and made an examination of these cattle which we are now investigating. I cannot [fol. 99] remember what date I went there, but it was about twenty-four hours after they were unloaded. I think it was the same day that Mr. Phelps came there. I made an examination of the cattle there which were sick.

Q. Did you conduct any post-mortem and take temperatures?

A. I cut open I think two animals. I took temperatures of some of the animals or saw them taken, in conjunction with myself, Dr. Kesselring and Dr. Nutting. We took the temperatures of the principal part of the cattle that were down, as I remember now some twelve or fifteen head, and as I remember we cut open two. The report that I turned into the Livestock Sanitary Board I believe shows that the temperatures ran from one hundred and three to one hundred and ten. We did not have any instrument to see whether it went higher than one hundred and ten degrees. From the examination that we made and of those that we cut open I arrived at the opinion that it was heat apoplexy, or heat stroke, which ever you might call it, that caused the death of those animals there. That was my opinion as to the cause of the death of the animals at that time. As o what condition I observed the intestines to be in and the internal rgans of those animals that we cut open, I believe that my report hows that I found everything normal with the exception of an en- arged liver and gall-bladder. I observed the other cattle that were round there and observed their condition, those that were not dead. just examined those that were down and partially down. My iagnosis was that they were all suffering with what I call heat rostration or heat apoplexy. I was there the biggest part of an fternoon. I could not say the exact length of time that I was there, ut as I remember I got there somewhere along—to Great Falls omewhere about two o'clock and went immediately to the yards and ut in the principal part of the afternoon there, that is as I remember ; I could not say as to the hours.

Cross-examination of E. D. Nash by Mr. Veazey:

When I arrived I did not inquire as to the treatment these animals ad received prior to their death. I did not inquire of Mr. Phelps as what had occurred in transit. I think I did inquire of Mr. Phelps s to what had occurred in transit before I made my report. I think met Dr. Nutting, excuse me, I think Dr. Nutting met me, if I member right, at the hotel when I arrived there but I am not cer- in about that. Before I made my report to the Livestock Board pon it I had seen the owner and had gotten the facts relative to the ipping from him.

Q. In that report that the owner made did he tell you that the ttle had been kept off of feed and water for twelve hours before load- g began?

A. I believe that my report states so, I think you have a copy of you should have.

I found all of the internal organs perfectly normal except that the er was slightly enlarged and the gall-bladder was slightly en- rged. In making my diagnosis of heat stroke I took into considera- n the weather at the time.

l. 100] Q. And you took into consideration the statement made the owner as to how they had been treated before loading?

A. I do not believe at the time that I held this post-mortem that

I had talked to the owner. That is my recollection, and I am not certain because I made no notes other than my report.

I also reported that if the cattle had been given attention as soon as they started to go down in the cars there would not have been as much loss as there was, and I still maintain that. I assume that the animals in transit came in contact with heat. That heat stroke could not be caused prematurely, if it was a heat stroke, by animals not being sufficiently watered and being carried on cars in hot weather without sufficient water. The cause of watering would not be the premature cause.

Q. Suppose animals were loaded on cars without being watered a long time before loading, and they needed water, and then they were carried in hot weather normally by the railroad, given a normal run for twenty-four hours, would that be apt to cause a heat stroke?

A. Would you explain to me what you mean by being off water for a long time?

Q. As to that, there may be an agreement or disagreement as to what the period was. I will assume for instance a period of twenty-four hours?

A. I would not say that would lend to the heat stroke.

If the animals were off water for forty-eight hours I would say that would contribute to the heat stroke; it would contribute to the weakness of the animals and take away from their ability to withstand the ordeal that they would have to go through by lessening the vitality. Of course it would contribute to whatever might occur. If they ate a substance like salt that would make them thirsty, and ate that after watering, I believe that would have a tendency to increase the desire for water. If I assume that animals are given water about twelve hours before loading began and eighteen to twenty hours before loading was finished and thereafter got no further water but did get a large quantity of salt, that would increase their need for water, if they got a large quantity of salt. It certainly would make them less able to withstand a normal transit over a railroad in hot weather. It would be hard on them if they got the water, if they got water after having a large amount of salt. If they had the water and then afterwards got the salt, that would make them want the water, but if they did not get it I do not know that it would hurt them. It would be good for them not to have water if they are going to be shipped. It would be better for them not to have it than to have it. As regards the salt, the salt would not make it wise to give them water after the salting, not if you are shipping, because it would physic them to death if they are given a large quantity of salt. I do not know anything about salt sage. I could not tell you anything about that because we have very little of that in this country.

Q. Maybe we are differing about salt?

A. Well, salt is salt to me; I do not know anything about salt sage at all.

[fol. 101] I am referring to a sufficient quantity of salt that would physic them.

Q. But suppose it was short of that, wouldn't there come a time where if they ate a woody substance that had salt in it prior to loading that that would make them need more water in transit, or make them more susceptible to heat stroke in a normal transit?

A. Now then, Mr. Veazey, that would altogether depend on the quantity of salt that this wood would carry. I have no way of knowing the quantity of salt that any wood would carry. I am no botanist.

If there was enough salt in this wood to make the animal desire a quantity of water, why it certainly would be bad to load the animal in that condition; and it would also be less able to withstand the heat of a normal transit in summer, if the animal had filled up on salt and had no water. As regards the ability of an animal to withstand heat, it is true also that you would have to consider whether or not the car was loaded or overloaded.

Q. And the overloading of the car, if there was one, as to which the parties to this case may differ, but if there was an overloading that would make it very difficult for the animals to withstand the heat of a hot summer's day in a normal transit?

A. Of course there is a great deal of controversy relative to loading and overloading. Now, I am not a shipper as you understand.

Without going into the question as to what is or what is not overloading at this time, as a veterinarian my judgment would be that overloading would be a factor to be considered as a cause of heat stroke in summertime. I would say as a veterinarian that it would be a factor with a car being jammed to the extent of being uncomfortably full.

Q. So, also if the animals had been driven some forty miles and had not been well watered and had not gotten good nourishment on the way and had been driven hard, all those things would be conditions that you as a veterinarian would consider, would you not, in determining whether or not the heat stroke was caused by conditions prior to shipping and would have resulted in a normal movement?

A. Well, I don't really know what you mean by hard driving. Usually cattle men, when they are driving cattle, use a great deal of care——

By the Court: You are not asked about hard driving except that it is mentioned in connection with this interrogatory, whether you would consider those things in forming your judgment.

A. Why yes, certainly I would consider them.

All those things that have been mentioned would be very vital in considering whether the animals could have withstood heat stroke in a normal transit in hot weather.

The symptoms of heat stroke are lolling of the tongue, comma, staggering and falling, eventually getting down and being unable to rise, and death following. Some authorities say there is congestion of the liver ordinarily in heat stroke, and some authorities say there [fol. 102] is not. There is quite a reverse opinion on that. As to enlargement of the right side of the heart in heat stroke, that is another thing that is in controversy by all the authorities that I have read. They claim there is congestion of the lungs in heat stroke.

Q. Isn't that a usual symptom, and a marked symptom?

A. I got hold of a physiology the other day that says it is not.

Q. Would you recognize that as a reliable authority?

A. Well, it is one of the latest authorities out—McCauleys Human Physiology.

As regards breathing, I would say there would be panting in heat stroke; but I would say there would be a tendency to suffocation. The thickening of the blood in heat stroke is another thing in controversy in veterinary physiology, as well as human physiology.

The characteristic symptoms of enteritis would be reddening of the bowel and of course there are two kinds of enteritis, one is acute and the other is chronic. In chronic you would have a reddening and thickening of the bowel, and at the point where the inflammation was the greatest the bowel would even be past the stage of red, it would be black, or almost black. The heart might be normal or it might not be normal in enteritis. It would generally be normal. The heart would be normal unless you had inflammation of the lungs, but in enteritis they would be normal. There would be apt to be scouring of the cattle. There would be apt to be scouring in heat stroke. The difference in scouring in heat stroke and the symptoms of enteritis would be that you would not have so much com*ma* in enteritis as you have in heat stroke. I do not believe that all the authorities agree on that.

Q. They disagree then as to the symptoms, as to whether there would be com*ma* or a fighting spirit in enteritis?

A. No, I do not know anything about a fighting spirit in enteritis, because any cow brute that is down and you try to assist them they are apt to fight you.

That is where there is enteritis or heat stroke or stuck in the mud or any other condition. There possibly might be a difference in the authorities as to whether com*ma* was a characteristic of heat stroke or enteritis. I think most of the authorities give the lolling tongue as one of the symptoms, those that I have read. The authorities give the lolling tongue as one of the symptoms of heat stroke. I never saw it in enteritis. As regards the congestion of the lungs, the authorities differ as to whether that would be found in heat stroke, and they also differ as to the enlargement of the heart and as to the blood matter, and as to the congestion of the liver. I have no authorities here with me. I have no authorities here that would sustain the proposition that congestion of the lungs is not a characteristic feature of heat stroke, because I did not expect to be called down here and have to testify along the lines of being a botanist or a mathematician or something I do not know anything about, and for that reason I came down here to testify from just what I knew from my own practical experience. I possibly might be able to produce authorities here in Billings or otherwise to which I have referred.

[fol. 103] Q. Could I trouble you to do that?

Mr. Enterline: I object to this thing of counsel asking the witness to help him in trying to find some books.

By the Court: Sustained.

Redirect examination of E. D. Nash by Mr. Enterline:

Q. Assuming that the cattle in this case had been driven four days forty miles, watered and fed on the range every day until they arrived the night before they were loaded and then watered from four to seven o'clock do you think there would be any injury done to the cattle in such driving, nine hundred and eight-four head?

Mr. Reynolds. Object to that as incompetent.
By the Court: Overruled.

Q. Driven four days and so on?
A. I would say there would be no harm to the cattle.
I said in enteritis, both chronic and the other, there would be a reddening of the bowel. There was no reddening of the bowel in any manner from the conditions that I have testified concerning.
Q. Well, in that condition of enteritis would there have been a reddening that would have been visible to your eye from such condition as you have described?
A. Any enteritis that I know anything about, it is very plain to anyone where the enteritis is sufficient to cause death.

Recross-examination of E. D. Nash by Mr. Veazey:

High temperature is charactistic of both of them, or there might be a sub-temperature in enteritis.

B. F. Davis, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is B. F. Davis. My residence is Cheyenne, Wyoming. I am State Veterinarian of the State of Wyoming. I am a graduate of Kansas City in 1907. Since that time I have practiced as a veterinarian for a short time at Fort Scott, Kansas; went from there into federal service in meat inspection on cattle, sheep and swine, and from there was transferred to western work in Colorado, and was transferred to Wyoming in March, 1908; worked for the government in that work for one year; resigned; went into business and general practice at Douglas, Wyoming; was appointed to my present appointment the first time in 1911; held that position for four years and seven months; resigned; purchased horses for the British Army; and was again reappointed to the position that I hold now March 20, 1918.
[fol. 104] Q. Doctor, in this case you can assume the following facts as I give you substantially to be true; that a train load of some thirty-two cars of cattle, carrying nine hundred and eighty-four head of one and three-year-olds, principally, from Cody, Wyoming——

Mr. Veazey: Pardon me, what was the age of the cattle?

Q. One and two and three-year-olds, some thirty-seven only of two-year-olds in the outfit, the rest practically evenly divided. They were shipped from Cody, Wyoming, and arrived at Great Falls, Montana, in the manner I will describe to you and the time it took to taken them there; that before their shipment they were driven some forty miles in a four days' drive; watered every day; averaged perhaps ten miles a day and rested during the night. The night before they were loaded they were watered from four until seven o'clock and the next morning passed over the ditch where they were watered before and driven about two miles and then were loaded, the loading taking from about ten o'clock to between three and four of that day on the sixteenth day of July, 1917. From there on they were taken in a prompt run and arrived at Mossmain in a seven-hour run on the train; they were kept at Mossmain in those cars, cattle cars, from about eleven o'clock on the night of the sixteenth until the morning of the seventeenth about six-thirty, approximately seven hours during a hot night and with no air stirring. When they arrived at Mossmain, Montana, the cattle were all standing up and apparently in good condition. About two hours after they had gotten to Mossmain they began to go down between one to five in a car. After being prodded most of them got up, but as it went on during the night, from an hour to two hours inspection, from time to time up until morning more went down from time to time until perhaps in the morning there were something like one to seven down in the cars as they would be inspected within an hour's time. They were then started out on the train; several stops made of approximately forty-five minutes each during a hot day; and they arrived at one place sometime a few hours afternoon. I might add that as they went along they stopped at a station about the middle of the day and a great many went down, and they were difficult to get up, and to prodding they would not respond at all; and along a few hours after noon another stop was made for an hour or more with a cutbank on one side and trees on another, extremely hot and no air stirring, and they were kept there for over an hour, and they were then taken on and arrived at Great Falls about six o'clock on the evening of the seventeenth of July. That would be the next day. The cattle were taken off of the train. Some one hundred and forty-five of them died. They showed a disposition to stagger and were in the condition of comma before death. We have some photographs showing their condition which I will show you, or I will ask you if you have seen those photographs?

A. No sir.

Q. Well, I will show them to you later. And the autopsy, or post-morten, showed or disclosed rather that the internal organs were practically normal with the exception—that is mean to say the internal organs were normal with the exceptions that I will give to [fol. 105] you: that there was a slight congestion of the anterior and posterior mediastinal lymph glands and enlarged gall-bladder and slightly congested renal gland. The temperature of one of the animals was one hundred and eight degrees. The small intestines were normal; the blood slightly thickened and in some of the animals the livers were slightly enlarged. Now, in addition to that, I want you to assume this, of course, and then I will ask you to express an opinion as to the cause of death.

Mr. Veazey: We object to that as not embodying the essential facts in the case and not embodying the essential facts set forth in the evidence.

Mr. Reynolds: And also embodying facts which would be within the knowledge of expert shippers of livestock, with which it does not appear this witness is familiar.

By the Court: Overruled.

Q. Now, I haven't quite finished my question. Assuming the facts that I have given you to be true, or substantially so, that some one hundred and forty-five of the animals that I have described died within a few days after their arrival there at Great Falls, what in your opinion is the cause of the death of those animals?

Mr. Reynolds: We object to the same for the reasons already given.

By the Court: Overruled.

Q. You may answer.

A. Well sir, from the history that you have given, taking everything into consideration that you have said, and from these photographs, it is my opinion that these cattle died as a result of heat exhaustion and faulty air that they were forced to breathe at the time they were on the side-track.

Cross-examination of B. F. Davis by Mr. Veazey:

In making this diagnosis I took into consideration that in Mr. Enterline's outline to me he spoke the truth, the weather conditions were as he described them, that these cattle were seven hours on the side-track at a time when there was no stirring of air.

Q. Well now, I want you to give the facts that you assume. Of course you assume that they are true. Now, give them, one after another, if you will, the facts which you as a veterinarian find it is necessary to assume in order to make this diagnosis.

A. Then I explain to you what he explained to me?

Q. You have made a diagnosis that on certain assumptions these animals died of heat exhaustion and faulty air while resting on the side-track. Now, I want you to state what facts you bear in mind in making that diagnosis.

A. Well, he has stated the temperatures.

The temperatures which I assume are the temperatures of these cattle that were taken after they were unloaded. I assume those temperatures, from what has been said here, to be from one hundred and four to one hundred and ten. That is one fact that I take into [fol. 106] consideration in making my diagnosis. Another fact which I take into consideration is one of the animals right out there in front in that photograph that apparently is in a weakened com*ma*tose condition.

Q. So, you took into consideration the photographs and their showing one animal in a com*mat*ose condition?

A. Might I see those again, if you will please.

Mr. Enterline: Yes.

(Handing witness photographs.)

A. I have reference to this one here in particular (indicating one photograph).

Q. The one on Exhibit O-L; the other pictures are of no assistance to you at all are they?

A. There is another practically the same.

Q. The other pictures there, other than the O-L, are of no assistance to you?

A. I am just going to look through these again if you please. (Examines photographs.) Apparently not, no sir.

As to whether the pictures other than O-L could not be of assistance to anyone in diagnosing the cause of the death; I do not know about other people, I only know as regards myself.

As regards an expert or anyone qualified to pass upon the deaths; I do not know as I could be qualified as to other experts, I can only speak for myself. I can only say that those other pictures are of no value to me. Exhibit O-L apparently has live cattle in it. That animal there is alive (indicating) and this animal is alive. I have reason to think that this animal over in the right-hand corner is alive. It is up on its sternum. This picture simply aids in the diagnosis; it is not all of it for the reason that the condition of those cattle indicates to me part of the condition. I know one thing, that a disease in cows, not steers, in what is termed a form of autointoxication presents the appearance which is almost identically the same as that condition in this picture, and therefore I may use the picture of that animal which I have in mind and base my diagnosis upon this too. I am not saying that heat is a form of autointoxication. I made two statements. I said the heat prostration and a form of poisoning that would come about as a result of the air they breathed that would be a form of poisoning. As regards the animal shown in the photograph, I would not be able to differentiate as to whether it shows a condition of heat exhaustion or a condition of poisoning caused by faulty air. The condition shown there which makes it characteristic of either heat exhaustion or faulty air is that the animal apparently is nearly exhausted; it is a com*m*atose condition and in my opinion within a very short length of time such an animal would very likely die. It might be at the point of death there in the picture.

Q. And if that com*m*atose condition was a com*m*atose condition existing immediately before death, it would not be diagnostic to you would it?

[fol. 107] A. Well, I do not think the position of the animal would change as it advanced toward death. I believe it probably died just in that position.

Q. And if before death, twenty minutes before death, it was not in that com*m*atose condition, then that would not aid you in diagnosis would it?

A. Well, it might change it.

I imagine that the animal in the picture probably lay in that position for an hour or two or three, and that com*m*atose condition was a condition existing as incidental to death.

Q. Suppose that prior to that it had been up and fighting, it was sick, had a high temperature but would get up and fight, would that affect your diagnosis?

A. The fighting of these cattle don't count anything with me. That condition that you have described might be a condition existing prior to the time that these animals went down. This animal, in my opinion, might at one time have been in the condition that you described.

I do not think it is characteristic of heat stroke that after an animal has suffered from heat stroke and felt its effect it is in a com*m*atose condition for a long time and gradually dies and that it is not in a fighting spirit when it is once down with heat stroke.

Q. You would say that even when it has been down by heat stroke, that even after that the animal will rise and fight?

A. It might not be able to rise. That will all depend, in my opinion, on the stage or condition. These sort of cattle will attempt to fight as long as there is a breath of life in them, that is the very natural thing.

That is a very natural thing even when they are affected by heat stroke and have been down.

Q. You would not say that a characteristic distinction between heat stroke and enteritis was that in heat stroke as soon as the animals are down by the heat stroke a com*m*atose condition sets in and continues until death, but in the case of enteritis the animals are fighting even after they are down and the com*m*a does not come on except immediately before death?

A. May I answer your question by a little explanation?

Q. Yes.

A. An animal such as we refer to there in the picture is apparently not in pain or distress. It is my judgment that an animal suffering from a form of enteritis or inflammation of the intestines would be in great pain all the time, and the fact that it was in that stage would have nothing to do with the condition of its brain or its vision.

Q. Now, coming to the next symptom that you have, what is the next fact that you assume?

A. Do I now—I have only in mind what I have seen in these pictures, is that the only thing?

Q. No, I have finished. Is there anything else in the picture?

A. No, I am finished if it is all right with you.

[fol. 108] We have considered the temperatures of the animals and the photographs. The next fact which I take into consideration in my diagnosis is that these animals have been described as weak; their co-ordination is faulty; they would *g*o down, etc. and as a result I am of the opinion that the brain was undoubtedly affected as a result of this.

Q. Now, what other facts do you assume in making your diagnosis?

A. Do you understand that a veterinarian in making ninety-five per cent of his diagnosis must take into consideration the history?

Q. That is just what I am asking you to take into consideration.

A. Yes sir, I took that into consideration.

Q. Now, what is the history which you took into consideration, the various facts?

A. Then shall I recall from memory what he gave to me?

Q. Unless you regard them as immaterial, whatever you regard as material I would like you to outline?

A. Well sir, the first part of the history taken into consideration would be the fact that these cattle were handled from Cody, Wyoming, to Mossmain and there they were set out on the side-track and left standing there for six or seven hours. That the setting out was done—was it near eleven o'clock at night, might I ask that?

Q. I think that is right.

A. From eleven o'clock until in the morning.

Q. To say five or six in the morning.

A. Well, that would make it six or seven hours. The heat of the day during that time was said to have been extremely hot, and that this night was still and that there was no movement of air. I can see these cattle held in this car with no movement of air, and as they exhale the one near it or next to it would be forced to inhale a part of the air given off by that animal. This process went on for six or seven hours, and as a result of that process you would have given off an excess of carbonic acid gas from the lungs, which would be inhaled by animals in the same car or in all of the cars, and after a certain amount of that form of gas is formed you would have a poisoning as a result of it. The fact that the night has been said to have been a cool one would have a tendency to sort of condense or dampen this air.

I was not asked about the coolness of the night in the hypothetical question.

Q. Then you did not take the coolness of the night into consideration in making your diagnosis?

A. Well, when I say collness I had in mind temperatures. That to me is history.

Q. Well now, you were asked about—you say you assumed that the weather was—the day was extremely hot, what do you assume that it was?

A. Do you mean what sort of day do I imagine that seventeenth day of July was?

Q. No, in your answer you say that you assume that the heat of the day was extremely hot when the animals moved from Cody. [fol. 109] A. When I assume do I understand?

Q. Yes, to what do you assume that temperature to be; what is extremely hot, what temperature in your opinion?

A. Well, it all depends on where you are. Taking into consideration at Cody the time that they were loading these cattle, or eleven o'clock at night at Mossmain?

Q. No, you said the day's ride from Cody to Mossmain was extremely hot. Now how hot do you assume it was?

A. It has been said that it was.

Q. But how hot do you assume that it was when you say extremely hot, what temperature?

A. Well, in Cheyenne we say it is extremely warm when it is around ninety-five.

When I assume the temperature of the night I imagine that that section of Montana would have nights very much like we have in Wyoming, which I would say are cool. I would not want to say that the temperature was ranging between fifty and sixty degrees if it was a still night and no wind blowing. The coolness of that night would have the effect that when an animal would exhale air the fact that it was cool would have a tendency to hold that air there, when the train was not in motion; it would not move away, as it were, and another animal in the car would be inclined to breathe a certain amount of the air exhaled by another.

Q. So, in your judgment if the night was cool rather than hot it would tend to increase this poisoning process?

A. It would have the tendency just as I explained to hold the air as it was exhaled right there.

Q. And therefore a cool night would be harder on these cattle while they were standing there than a hot night, because of the tendency this cool night would have to settle down the breath of the cattle?

A. Let me ask this. That these cattle worked and handled on a day that was exceptionally warm. All that time this heat was in the body and then after this train stopped they began this cooling off process, as it were, and that would aid to that too.

Q. So that under all of these conditions you think it would have been better for the cattle if that night had been a hot night rather than a cool night, because it would have diminished the settling of the bad air from the breath of the cattle?

A. No extreme from one to the other is good for cattle. A reasonably warm night would have been better than a cool one.

Q. A reasonably warm night would have been better than a cool one?

Mr. Enterline: That is just what he said.

By the Court: The objection is sustained.

Q. What other facts do you take into consideration?

A. I think that is about four and a sufficient number.

I do not assume that cars were on other tracks adjacent to the track in question. It is my judgment that if the train was standing [fol. 110] in a cool night on a side-track without cars on either side the animals would be affected by the heat which they had previously gone through in the daytime, that stored up heat. As to how long after the train was stopped the cattle would begin to be affected by the exchange of gas and would be poisoned, I would say that in this condition I believe it would begin in an hour and a half. I believe that the fact that these cattle began to go down within that time would indicate that some of them had become affected then as a result of it. The effect that would take place there would be a poisoning proposition and not a heat proposition, in which the exchange of gases in the lungs, in which this excess of carbonic gas would enter the blood and would poison it in the way I have referred to.

Q. Similarly if an animal is put on a car at any time in hot weather and the car is permitted to stand and there is no breeze blowing, do you think that the same result would follow?

A. You are talking about one animal and I have in mind a carload.

Assuming that a carload of animals is loaded and then is left standing and the weather is hot, the effect on those animals would be the same, if they were left there for a great length of time, as I have described. It would affect all cattle alike if conditions were alike?

Q. How long after a car was loaded could the animals stand in the hot sun before they would begin to be affected with heat stroke?

A. What is the temperature where these cattle are? That question is so framed I can't get down to answer you. I want to be fair.

Q. I will let you place any time or any temperature; assume the temperature is ninety degrees.

A. Well, now then you must take into consideration the condition of the cattle as regards flesh. The better the condition, and that applies to any kind of livestock, sheep or hogs, or cattle, the more susceptible they become and the more likely to be overcome by this condition.

Q. Then assume that your cattle are in good condition and that they have been loaded and the temperature is around ninety, and the cars stand there in the daytime, how soon would those cattle show heat prostration and become prostrated by the heat?

A. Now that heat prostration and that condition you have referred to——

By the Court: Wait a minute now. Answer the question if you can; if you can't say so.

(Question read.)

A. I can't answer that question.

I can answer the effect of poisoning on a cool night easier than I can a question of the effect of heat on a standing car in the day- [fol. 111] time, because I have in mind specific instances where such a condition existed.

Q. You have in mind a specific instance where a car was standing at night in cool weather?

Mr. Enterline: That is what he said.

A. But I can give no instances of where animals have been hurt standing in a car, standing still in the daytime in hot weather.

Q. You would feel qualified to speak then in this case in the main as regards the poisoning features rather than the heat stroke?

A. You mean that, in my opinion, is the most essential thing in determining the cause of death of these cattle?

Q. No, but you would feel more qualified to express an opinion as to the poisoning of these cattle than you wou'd to heat stroke being the cause of their death?

A. In my judgment it is the main factor.

In my opinion the poisoning is the main factor in the cause of their death.

Q. So that you would say that your diagnosis of the cause of the deaths was poisoning rather than heat stroke?

A. They were both there, both conditions in my opinion existed, but I lay more stress on this condition that I have described there of this absorption of the carbonic acid gas than I do the other.

I imagine that the heat part of it came into play during the time that these cattle were sitting on the cars at Cody before they started to move them, and I think the movement of the cattle had a great tendency to right a condition that existed there, although I do not know that it did exist. I would not say that the heat stroke as a part of my diagnosis as the cause of the deaths started with the loading of the animals at Cody and continued up to Mossmain. I would not say it started at the loading, because it is remarkable how long you can keep cattle in cars when they are moving. I am of the opinion that the heat stroke of these cattle started when they were put in the cars at Cody. I would not say that the effect of the heat leading to the heat stroke continued throughout the hot day while they were in transit. I think that if it did start there, the minute these cattle were put under way and moved it began to clear up and right that condition. As regards this poisoning that I spoke of, I would say that overloading the car with the cattle would tend to increase that. As to overloading and the effect which it would have upon animals becoming affected by heat in a normal transit in hot weather over a railroad, I would say that overloading is a bad thing.

Q. And leads to heat stroke?

A. You understand that cattle could be overloaded, take a long ride on the cars and none of them become affected, if the condition was to exist. Overloading is not a proper thing.

Q. But would you say that it would be a contributing cause toward heat stroke in a normal transit over the railroad?

A. Well, I would say to you that if you would load two cars, one of them properly loaded, if we could determine that, and another overloaded, conditions just the same and cattle in both cars died from [fol. 112] heat exhaustion, then I am of the opinion that where the cattle were overloaded you would have your greatest death loss.

Q. Would you say that overloading in hot weather is a serious matter to take into consideration in a case where animals are said to have been prostrated by heat?

A. I want to say "Yes" to your question.

It is true also that even if animals have a normal transit from Cody to Great Falls over the railroad and the railroad moves them normally, if the cars are overloaded and the weather is extremely hot, that is apt to be strong proximate cause of heat stroke in those animals.

Q. So that if also animals are not watered properly before loading, whatever properly may mean, is that fact to be taken into consideration in determining heat stroke, is it not?

A. How are we going to decide what is proper?

Q. I am not asking you to decide.

Mr. Enterline: Then I object to the question unless he puts some assumption to the Doctor.

Q. I am asking you to consider whether the watering of cattle, the amount of moisture in the tissues at the time of loading, is a fact to be considered in determining whether the animals could withstand heat stroke in a normal shipment over a railroad in hot weather?

A. Either extreme is bad——

By the Court: Answer yes or no to the question. Is it a fact to be considered or not, if you can, if you can't answer it, say so.

(Question read.)

A. Well sir, I do not know how to answer that question for you the way you have placed it.

Q. I want you to assume, coming to something else now, that animals are loading at Cody, Wyoming, loading being finished about four o'clock in the afternoon of a certain day and it is ordinary weather, not hot, say around seventy decrees, and the animals continue in transit to Great Falls, Montana, during weather of that character seventy degrees, and during that time they are set out, cars are set out at Mossmain for the period of seven hours—from eleven o'clock at night to five or six in the morning—the night being a cool one, say from fifty to sixty degrees, and there no air stirring, no wind, would you expect those animals to exhibit signs of this poisoning upon arrival at Great Falls?

A. You have no death losses in this shipment?

By the Court: Answer yes or no if you can. If you cannot, say so.

A. Not necessarily, no.

I would not necessarily expect death at destination.

[fol. 113]

(12-13-20.)

Frank Carney, a witness called on behalf of the plaintiff, being first duly sworn, upon direct examination by Mr. Enterline testified as follows:

My name is Frank Carney. I live at Great Falls. At the present time I am engaged there in the cattle business. I have had seven or eight years' experience in the cattle business. I remember the time when what were know at the Phelps cattle and the Galbraeth Cattle Company cattle were in the yards there in Great Falls along in July, 1917. I was there on that occasion. I would say that I first saw the cattle between the hours of probably six and seven o'clock, maybe between the hours of six and eight o'clock, in the morning. At that time they were unloading the cattle or were just about through unloading them. I observed their condition there and the watering facilities there to some extent. At that time there was just one pen in the yards there at Great Falls that had any water facilities. They were watered there in the corral with a watering trough. I could not give the length of the trough accurately, but I would say it was ten or twelve feet long. When I first saw the cattle I did not pay any particular attention to the cattle, except that I just noticed them and noticed they were a train of cattle, and drove over just to look at them and drove away; but later I came back in a few minutes and I noticed that the cattle were trying to get to this water and they were piling up, some of them were down. So I inquired as to who owned the cattle. It looked like a kind of serious condition to me. I had been interested more or less in cattle and I thought it was a funny thing. I reported that to Mr. Pewters of the Great Northern.

Q. What did you tell him?

A. I told him what the condition of these cattle were and I thought——

Mr. Reynolds: Wait a minute. We object to what he said to Mr. Pewters as incompetent, irrelevant and immaterial, and hearsay.

By the Court: Who was Mr. Pewters?

A. I think he was the agent at that time.
Q. Of the Great Northern?
A. Of the Great Northern, yes sir.
Q. And what did you tell him?

Mr. Reynolds: The same objection.
By the Court: Overruled.

A. I told him what I saw about these cattle, and personally I thought someone ought to give them a little attention.

He came back over to the Great Northern yards with me and he says: you go ahead and do whatever you think ought to be done with them for us and put in a bill for it, which I did. After that I buried the cattle that had died.

[fol. 114] Cross-examination of Frank Carney by Mr. Veazey:

I would say that I first saw them between the hours of probably six or eight o'clock. I do not know definitely, but it was sometime in the morning. They had not finished unloading them; they were still unloading them. They had not finished unloading those that were up on their feet at that time. I think they were still unloading. The train was still at the yards. When I came back later they had unloaded all that they could get out of the cars.

Q. At that time weren't they unloading only the ones that had to be dragged out of the car, or given special attention in getting them out of the car?

A. Now, I would not say. They were still unloading. The train and switch engine and crew were still there. I did not give that particular attention.

I could not say whether they were unloading those that could walk out of the car or those that would need special attention. Those that were down in the yards would make a plunge for the water. As I would describe it, they were all headed towards this water in a long alley, some of them going right up over the tops of one another, and in the pens that the water was in a lot of them were down while the others were coming right up over the top of them. I do not know where the caretaker was at that time. I do not know what you mean by the caretaker. I do not know Mr. Wright. I saw somebody there that seemed to represent the shipper. There was a young fellow there whose name I cannot recall now. I do not know as I ever heard his name. It is true that I did feel that if he were supervising the attention that should be given to the cattle while unloading, or whoever was supervising that attention, was not supervising it correctly, whether it was the railroad company or the shipper's man. So I reported to the railroad agent, Mr. Pewters, that he, for the protection of those cattle, should get in and give them the attention that should be given them. I did not make any suggestion to him that he get a competent livestock man that would understand how to handle cattle; I just mentioned that I thought someone ought to give them some attention, and thereupon he requested that I should look after them, and I did to some extent. They had a lot of men there, probably thirty of forty section men. As regards burying the animals, the check to which you call my attention represents the payment that was made for the work done by me in burying the dead animals, and it bears our endorsement.

Mr. Veazey: We will offer this in evidence.

Mr. Enterline: We object to this at this time. It is part of your main case.

Mr. Veazey: That is true.

Mr. Enterline: It is not properly identified.

Mr. Veazey: It really ought not to be put in at this time, but counsel asked about the payment of the witness in the burying of the carcasses, and it would simply save recalling the witness. (Check marked "Defendant's Exhibit 4.")

[fol. 115] Q. And after looking at that check and your endorsement you will say, would you not, that you received from the railway company seven hundred and seventy-two dollars and thirty cents for the work that was done in burying the carcasses?

Mr. Enterline: We object to that as not the best evidence, for the reason that the exhibit will show for itself.

A. Yes.

By the Court: The objection is overruled.

Q. Was that the reasonable value of the work done by you?

Mr. Enterline: Objected to as improper cross-examination and immaterial at this time.

By the Court: I do not think it is proper cross-examination, but I will let it go in now to save a little time. Also the record should show the objection to the offer of the exhibit is overruled.

Q. Was that the reasonable value of the work done by you?
A. Yes.

Mr. Veazey: We now offer this in evidence.

Mr. Enterline: We object to it as improper cross-examination, not competent until the proof is introduced upon the alleged counter-claim.

By the Court: Overruled.

Evidence: Defendant's Exhibit 4

Great Northern Railway Company

Month of September, 1917.
Auditor's No. 710.

I certify that this is a true copy of an original account approved by the proper officer, that the same has been examined, found correct, registered and filed in the accounting department of the company.
(Rush.)

J. H. Boyd, Auditor Disbursements.

Approved for payment.

G. R. Martin, Comptroller.

For—excavating and burying 142 head cattle at Great Falls out of the L. G. Phelps shipment.

Examined and Credit Allowed Dec. 11, 1917. G. R. Martin, Comptroller.

No. 47848.

St. Paul, Minnesota, Oct. 11, 1917.

Pay to the Order of Brown, Leahey & Frazer, Address, Great Falls, Mont \$772.20 Seven Hundred seventy-two and 20/100 Dollars (Not over eight hundred \$800\$) in settlement of above account.

[fol. 116] To First National Bank, Great Falls, Montana.

Great Northern Railway Company. L. E. Katzenbach, Treas.,
by F. L. Paitzold, Cashier.

Endorsements: (On back:) Brown, Leahy and Frazer, by Frank Carney. First National Bank, Great Falls, Montana. Paid Nov. 28, 1917. Commercial National Bank, Great Falls, Mont. Paid Nov. 23, 1917.

Otto Cassidy, a witness called on behalf of the plaintiff, being first duly sworn upon direct examination by Mr. Enterline testified as follows:

My name is Otto Cassidy. I live at Pitchfork, Wyoming. I am now in the employ of L. G. Phelps. I was in Great Falls, Montana, in the month of July, 1917, when a consignment of cattle known as the Pitchfork cattle were going through there. I think it was on the eighteenth day of July as well as I remember in the evening. I went there through curiosity. I went there with a fellow by the name of Beatty, who lives at Great Falls. When I got to the stockyards there at Great Falls there was a lot of dead cattle around there and the main herd was not at the yards when I got there; they were out from the yards, and there were a few cattle down in the yards and around the outside of the yards. I expect I have had possibly twenty-five or twenty-six years' experience in the cattle business, and perhaps more.

Q. And will you state to the jury what, if anything, those cattle were suffering with, those that were alive there?

Mr. Reynolds: Objection to that as incompetent.
By the Court: Overruled.

A. Why, they seemed to me they was suffering with heat as far as I could tell.

I was later employed to look after the cattle there. I had taken charge of the cattle on the morning of the twentieth of July. At that time, or before that time, I had not observed the remaining or main herd. I did not see the main herd until the morning of the twentieth. When I did observe them they were not in very good condition. By that I mean that they were restless and weak and hard to hold, and looked gaunt. I went with the shipment when they went to Seville. I drove the herd out from Seville to the reservation, or out to the range. We unloaded on the reservation and I was with them four days, four or five days. I believe they had improved in their condition when they were received at Seville as compared to their condition when I observed them there at Great Falls. I believe they had improved as far as the first time I saw them and the last time I saw them. In addition to their looking gaunt when they arrived at Seville some of them was bruised around the head, and had lumps on the side of their heads. Mr. Galbraeth and I were talking about it, and I saw bruised lumps on their heads. After I went away, after being with these cattle four or five days, I [fol. 117] was back there with these cattle last fall, a year ago this last fall. That was the next time I was there and the only time. I saw some of the yearling cattle at that time. At that time I think they had recovered into a normal condition. That was two years afterwards.

From the time when I was with them for four or five days I had not gone back until some two years afterwards.

Cross-examination of Otto Cassidy by Mr. Veazy:

I took charge of the cattle on the morning of July twentieth if I remember right. Prior to that time I had never been in Mr. Phelps' employ or the employ of Mr. Galbraeth. I had never met either one of them. I had never met Mr. Phelps at all. After my return to the reservation I worked for the State of Montana. After my return to the reservation I did not work for Mr. Thorpe or Mr. Galbraeth or the Galbraeth Cattle Company. I did not work for Mr. Phelps in Wyoming; I worked for him in 1917 and up until May, 1919, and I went away and came back in May of 1920. I am working for Mr. Phelps now. I was in charge of the reloading of the cattle at Great Falls with Mr. Thorpe. Mr. Thorpe and I were both there in charge of the reloading. I think there were three others there with myself and Mr. Thorpe reloading for the Galbreath Cattle Company, making five altogether. In the process of the loading there I was stationed around through the yards there; I was not stationed at any particular place. Five men could reload the cattle.

Q. And you were the ones that were helping with the reloading?

A. Oh, there was some other men around there, I suppose they were section men, railroad employes, around there.

I do not remember that I counted the number of the animals that I found bruised. There must have been thirty probably. That would be just a rough guess; I do not believe I counted them, or if I did I have forgotten just what they were. As regards the balance of the herd I would describe their condition at Great Falls as not in very good condition—restless, weak and hard to hold, and looked gaunt.

Q. And that is the way, as an expert cattle man, you would describe their condition?

A. Well, I do not know that I am an expert cattle man, but that would be my judgment on it.

After they arrived at Seville they had not improved much at the time I left them there, if any.

Mr. Enterline: If your Honor please, at this time, and before resting, I desire to amend first in paragraph four of the complaint on page two, line twenty-five, the last word on that line, by striking out "forty" and inserting the word "eighty" and on the line twenty-six, after the word "eight" insert the word "four" and then change the figures to "984" following that; also amend paragraph numbered fourteen on the last page of the complaint in line four by striking out the word "thirty" and writing in lieu thereof "forty."

Mr. Veazey: We object to the plaintiffs at this time increasing the amount demanded in the complaint. The plaintiff has had [fol. 118] ample opportunity to consider what would be the amount it was desired to demand; the claim has been pending for three years at this time, it is one year after the complaint has been filed, and it is unreasonable to allow the plaintiffs to increase the amount of damages; also the proof does not justify the amendment.

By the Court: The amendment is asked in order to conform to the proof?

Mr. Enterline: Yes sir.

By the Court: The objection will be overruled.

Mr. Enterline: Also amend the figures in parenthesis on line five by striking out the word "three" and inserting "four."

Mr. Veazey: The same objection.

By the Court: Overruled.

Mr. Enterline: Also amend the prayer of the complaint on the line nine by striking out "thirty" and inserting "forty" in lieu thereof.

Mr. Veazey: Same objection.

By the Court: Overruled.

Mr. Enterline: On line ten by striking out the figure "3" and inserting the figure "4" so that it reads "45,000" instead of "35,000."

Mr. Veazey: The same objection.

By the Court: Overruled.

(Plaintiff rests.)

T. F. Kling, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I was the agent at Cody on the Burlington at the time this shipment moved out and for some time prior thereto. Thirty-six cars thirty-six feet in length were ordered by Mr. Phelps for this shipment. That order was placed on July eleventh at ten thirty A. M. By the time the cattle arrived the thirty-six cars had been provided. I did not see the loading of the animals or see the animals; I was engaged at the office. I do not recollect what the distance is from Cody to Mossmain. I would judge it is about one hundred and forty-five miles. I will look that up and advise you whether that is correct.

No cross-examination.

W. C. Kent, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I am living at Casper, Wyoming. I am in the oil business at the present time. In the summer of 1917 and prior thereto I was engaged in the cattle business at Cody, Wyoming, with the W. R. Coe Cattle Company.

[fol. 119] Q. How extensive was the business of the Coe Cattle Company at that time?

A. Oh, around six thousand.

I was engaged in the cattle business about twenty years before I went into the oil business. I occupied the position of foreman with the Coe Cattle Company. They were ranging cattle in Wyoming at that time; they were ranging cattle all over the Big Horn Basin. That is a range adjoining the Pitchfork range. I am acquainted with the range of Mr. Phelps at the head of the Greybull. That includes the Pitchfork range to which reference has been made here. That also includes the Ninety-one Ranch. The conditions in that district preceding the summer of 1917 were not very good. I could not say whether or not the Phelps cattle were fed in the early part of the summer of 1917. I saw the cattle in question on the evening of the fourteenth before they were shipped. That was at just above the crossing of Sage Creek. There were near a thousand head of them. That was at the time they were being moved to Cody for shipment. The Coe Ranch is about ten miles from Cody and right on Sage Creek. I observed the character of these animals as to the condition they were in and the breed, size, etc. They were from yearlings to three-year-olds, not very good condition I did not figure. They had not shed off thoroughly; they had not shed off yet thoroughly. I would consider that that would indicate a bad winter. I would say that the three-year-olds at that time would weigh around ten hundred and fifty pounds. The breed of the cattle was Hereford, what they call range cattle. They were pretty wild. I should judge that they were a half mile from the crossing on Sage Creek when I first saw them. When I saw them they were probably half a mile from the creek. I rode down the creek and they were trailing across the creek in this lane which is about a quarter of a mile long, or a little better, and there is a creek running through it. They just trailed them across it out at the end of the lane. They had their wagon sitting there and there is a litle ditch there, and the cattle were right out on the bench. They were coming from the south. I spoke of a lane or alley. This alley crosses Sage Creek. They have to go through this lane to cross the creek.

Q. Can you just mark on this paper, Mr. Kent, just how that lane is and the creek; just how it crosses (handing witness paper which was later marked "Defendant's Exhibit 5"? Now, which way is north and which is east and which is west?

A. This would be east (indicating on the paper). The lane runs ast and west.

As they went through the alley they were going west. There s not more than one stream across that alley. At the end of the lley there is a little ditch. The line which I mark on the diagram vith an arrow represents the creek. The line which is marked 'B" is the ditch. They came to the ditch first. They came from he west to the east instead of the east to the west as I stated. That lley is a little better than a quarter of a mile long.

fol. 120] Mr. Reynolds: We offer this in evidence (Defendant's xhibit 5.)

Mr. Enterline: No objection.

By the Court: Let the record show it is received in evidence withut objection.

(Which said Defendant's Exhibit 5 was therefore received in vidence and is by this reference made a part of this bill of excepons.)

I should judge that the alley is about sixty feet wide. The size f the creek as it crosses that alley is a small stream, probably three et wide and three inches deep at that time. There is a bridge ross the creek. That bridge is about sixteen to eighteen feet wide. n crossing the creek through that alley it is not possible to cross on both sides of this bridge; you can only cross at the upper side of it because there are steep banks on the lower side and you cannot get across. The space between the bridge and the fence of the lane on the lower side through which they can go is probably around thirty feet wide I should judge. The ditch which I mentioned is just a small ditch, probably eighteen to twenty inches wide, the water surface, and I should judge from one to three inches deep. It is an irrigation ditch which runs pretty much on a level at that place. In crossing this stream the cattle did not stop to drink at Sage Creek. With as large a number as this, pretty close to a thousand head of cattle, crossing a creek the first twenty-five to fifty head of cattle in the ditch would make the water absolutely muddy.

Q. After the first few had come to the creek was the water in such condition that they could or would have drank it?

A. The first few could have watered at the creek.

As to the rest of them, just as they went through this narrow space at the creek they might have sipped up a little water, but there was men all along through the lane there bulling them along. They seemed to be rushing them right through the lane; I would not be able to say how fast. I would not be able to say how fast that is per mile. As to whether or not they were driven so fast that they were not given opportunity to drink, I could not say that they had much opportunity to drink. At the ditch it was the same proposition; they did not have any more time at the ditch than they did at the creek, besides it was practically impossible after the first twenty-five or fifty head went through it. I would say that six or seven men were driving this herd. All the men that I saw were horseback. They were rushing them along as anyone would trying to haze a bunch of cattle through a lane. By "haze" I mean crowding them through. After they passed this ditch they were taken out upon the bench and held that night about a quarter of a mile from the ditch. When I first saw them it was probably half-past four to a quarter to five. I said that they had not shed their hair yet and did not appear to be in good condition. They did not seem to be so awfully weak; they looked gaunt, looked like they had not had great deal of feed through the winter. There was practically no feed at all on the range in the vicinity of [fol. 121] Sage Creek at that time. The range between Sage Creek and Cody at that time was not very good at all. I would not think that it was sufficient to give cattle a reasonable fill from day to day as they would be driven from Sage Creek to Cody in a herd of nine hundred and fifty to a thousand head of cattle. I saw these cattle after they had passed Sage Creek and had stopped there for the night on the next morning between six and seven o'clock at a distance. They were trailing towards Cody. After that I saw them the morning of the sixteenth I should judge about around five o'clock. At that time they were just above Cody. At the time I saw them they were trailing into Cody and I rode in with the bunch. At that time they were across the ditch and Cody Canal both. I know what the conditions are above the Cody Canal. It is mostly salt sage back for two miles. I saw where the cattle were bedded that night as I came to town. In the vicinity in which they were there was practically no feed except this salt sage.

Q. In your business in handling livestock have you observed at any time the effect of salt sage on cattle where the cattle have not been used to eating it?

A. Well, nothing seriously. I have fed cattle around in there in through the spring and when they get on that salt sage it don't agree with them very good.

It seems to scour them and make them weak. Salt sage is just a little plant that grows around on those flats, gumbo flats more or less. It is a light colored small weed. It seems that it contains the property of salt. It takes considerable water to agree with cattle. When I first met them they had not reached the river adjoining Cody. That was on the morning of the sixteenth. I helped them drive from that time on up to the little flat above the yards. There was no opportunity for the cattle to water at the river; they could have but we did not stop. There was a bridge there across the river. The cattle crossed on that bridge. That bridge is eight or ten feet high above the water. There was opportunity for the cattle to drink at the river there at the bridge, but we lined them up on both sides and drove them across. From the time that I met these cattle on the sixteenth up to the time that they were loaded we trailed them across the river up on this flat; started to cut them out. I think part of the boys, when we got across the bridge, went back to town, and there was three or four of us left there to work them out, and I and Henry Lenz started to *shopping* them out and we possibly had a hundred to one hundred and fifty cut out when Mr. Sales, the foreman of the cattle, came and said that they would work the rest of them and we went back to town, part of us, to get our breakfast, and when I got back they were in the stockyards. Harold Hill was with Mr. Sales when he came up. Mr. Sales was the foreman for the Phelps outfit. In cutting out the cattle we did not have any cutting chute or anything of that kind, we cut them out on the mesa as long as I was there. We were up on this little flat and held the main herd and cut out the three-year-olds, drove them out twenty to twenty-five yards. In doing that we drove into the herd and singled out one and drove him away from the herd. We would [fol. 122] ride into the herd and single out a steer and put him out to the cut herd. At first we had to hold the main herd quite a little ways back from the cut herd. We were short-handed that morning and the steers were wild and we cut them out quite a ways, I would say twenty-five yards.

Q. What was the effect upon the herd in the vicinity of the ones that you would cut out, when you rode in there to cut them out, as to whether it disturbed them?

A. Well, it would naturally rile a steer up more or less.

In this cutting out process the steers were put into a running motion. As a general rule, where you are cutting from one herd to the other, where you are short-handed it is necessary to put them into running motion.

Q. What would you say as to whether or not during the time you saw these cattle moving over the range as to whether or not there was more or less milling?

A. Moving over the range?

Q. Yes.

A. You mean in the trail herd?

Q. Yes.

A. Well, there weren't much milling as far as I could see. They were pretty well bunched up; they looked like they were trailing a bunch of sheep more than cattle to me.

On the morning of the sixteenth when we were cutting and loading they were bunched up in a herd. In the trailing we had them bunched up practically all the way through. I should judge that we started that morning at nine or ten o'clock, somewhere near that. I should think that we finished the loading somewhere around four o'clock, near that, between three and four. I believe the three-year-olds were loaded first. We cut them first; naturally they would go into the corral first. We loaded one car at a time. We only had one chute. After we got that car loaded we moved it down the track and another car was put up to the chute, and we continued that until the loading was completed. From twenty-six to forty head, if I remember right, were loaded to the car. I should judge that around twenty-six head of three-year-olds were loaded to one car. Occasionally we duck a yearling into a car. In driving a heard of cattle over the range such as this on a hot summer day I should say a herd of that size, on a hot summer day, should not be driven over three-quarters of a mile to the hour at the outside. The grass on the range at that time was soft and green. That would not have a very good effect upon cattle as to fitting them for shipment. They would not withstand driving as well as they would on dry food. They would not stand the drive; they would be more weak than they would on dry food.

Cross-examination of W. C. Kent by Mr. Enterline:

When I first saw the cattle they were within about half a mile from Sage Creek crossing and I was coming down the creek. When I first saw the cattle I was probably three-quarters of a mile to a mile [fol. 123] away from them. As to whether there was anything extraordinary or unusual that attracted my attention while they were being driven through the lane, I just naturally stopped there to see them go through. As a usual thing when you drive cattle through a lane you do not usually rush them through to make them tear the fences down and one thing another. When they got through they went up on the beach and stopped there and stayed there all night. I have had some experience as a cattle man for a number of years. I do not know as a cattle man that you cannot keep an animal away from water if it is really thirsty if there is water anywhere near, under the conditions with as few men as there were with that drove.

I know as a cattle man that cattle will smell water great distances and go to it when they are very thirsty, but I think they will go over it, although real thirsty, because men are driving them. You did understand me to say that when they got to the ditch that the first few that went over made it all muddy and it was useless then for the rest. Under those circumstances, if the first few got it all muddy, the natural thing to do would be to let them trail across. There was nothing unusual that I observed about that in seeing them go on across. If there was mud there they could not drink; there would be no us of letting them stop. Under the circumstances I do not think that that did these cattle any injury. As far as I know the next day they got plenty of water up at the Cody Canal. I know that there are excellent facilities there. The three-year-olds weighed about ten hundred and fifty pounds approximately. That was a good, fair average weight for cattle at that time of year, of that class of cattle.

Q. So that they were in the average fair condition that cattle would be at that time and that age, isn't that true Mr. Kent?

A. Well, on an average they would run around there I guess. I should judge that the yearlings would weigh around four hundred pounds. That was a fairly good average of cattle of that class and breed. I was not along as they were driven along, other than at the time I saw them there going through this lane. That is approximately all I saw in the way of driving. Of course I know where the Pitchfork Ranch is, and I know where the Ninety-one Ranch is. If it took them four days to go from Pitchfork to the Cody Canal and they arrived there something like in the afternoon of the fourth day, that was no rapid drive for a bunch of cattle of that kind, if they put the whole day in on the trail.

Q. Assuming that they had an opportunity to rest at night and it took them nearly four days to do it, now as an experienced cattle man, Mr. Kent, you wouldn't say that was a rapid drive would you?

A. Twelve miles a day for twelve hours wouldn't be so bad if they trailed them along and strung them out.

They would have to string them along in order to use up that time, twelve hours. Necessarily they would have to stop some of the time. In the month of July the grass there was soft and green at Cody.

[fol.124] Q. At Cody. How about along the route there, Mr. Kent, do you know the general condition of the range there as to whether it was dry grass or soft green grass?

A. Well, that spring was a late spring and the grass was rather late that spring.

Q. Well, would you say that there was soft green grass along the entire route from Pitchfork to Cody, including at the Cody Canal?

A. Well, as far as I know back about the range there was very little food except the last three or four miles into Cody.

The character of the feed around Cody there was mostly salt sage. I have been around Cody and Wyoming there, and in Montana, practically all my life, and I know that there are practically thousands of acres of salt sage in Wyoming that the cattle graze on year-in and year-out. I say that the eating of salt sage is serious to cattle when they graze on it in the state of Wyoming. If they do not get water and nothing but green salt sage. As a rule cattle do not eat it until it is dry. There was very little feed around Cody outside of the salt sage. Unless salt sage was practically all the feed that they could get, I could not say whether they could get enough of it to hurt them. I am an experienced cattle man.

Q. Now don't you know Mr. Kent, that the scantness of the feed there, of the salt sage, on a drove of cattle or herd of cattle of some nine hundred and eighty-four head could not do them any injury, any serious injury at all? You said the range was scant.

A. It was.

Q. Yes.

A. I could not say whether?

Q. What is that?

A. I don't know as I could.

With reference to the time when they were loaded, in cutting out the three-year-olds from the drove, that is the usual way in which cattle are loaded; that is the way it must be done there at the Cody yards. We pursued the usual way that shippers usually do in shipping a herd of cattle to the market; they most generally cut them out. That is the way it was done on this occasion, they were cut out. I stayed there until the entire train was loaded. I could not say whether there were some cars left after the train was loaded, some extra cars. I know that there were thirty-two cars loaded. I heard the station agent say there were thirty-six cars ordered, but there were other cars on the track there and I did not pay any attention. I did not assist in the loading and driving of the cattle into the cars. I stood at the chute and took tally of the cattle and number of the cars. They would fill up one car and then after that car was full another car was moved up by the engine. That is the usual way there at Cody. I did not see anything out of the ordinary in that.

Q. I believe you testified something about the steers being wild, range cattle act generally just about as these cattle did, don't they?

A. Well, you take range cattle——

Q. These cattle were range cattle, weren't they?

[fol. 125] A. Most all range cattle are wild.

I did not notice anything out of the ordinary in that regard.

Redirect examination of W. C. Kent by Mr. Reynolds:

I stated that as a rule cattle will not eat salt sage when green. They will eat most anything when they are hungry and they will eat it when they are hungry and haven't anything else. With reference to driving cattle twelve miles in twelve hours as I testified on cross-examination, I would say that if I was trailing a herd of cattle I would start them in the morning and let them lay off a little while in the heat of the day and drive them a little later in the evening, if it was a hot summer day. Twelve miles in twelve hours in the hot summer would be driving the cattle too fast if it is in the heat of the day.

Recoss-examination of W. C. Kent by Mr. Enterline:

If these cattle were started out early and then permitted in the middle of the day to rest along about eleven o'clock and then permitted to go on, that would be the ordinary way to do it.

Harold Hill, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I live at Cody, Wyoming. I am just a common laborer. During the summer of 1917 I was employed by the Phelps Cattle Company as a cowboy at Pitchfork, Wyoming. I rode the range for them. They had a range of possibly from thirty to sixty thousand acres. Before these cattle were rounded up for the trip to Cody they were ranging on the south side of the Greybull River near Pitchfork, Wyoming. That was on what they call the Pitchfork Range, just off from the ranch. I had something to do with the rounding up of these cattle prior to driving them to Cody. I assisted in the roundup of these cattle from the time the roundup was started on the morning of the fifth of July, and from that time until we trailed. We started to trail on the morning of the twelfth from the Pitchfork Ranch. The range at that time and prior to that time was just getting nicely started, the feed was not anything extra. At that time the cattle were thin, but apparently s-rong. I am not able to state what the approximate weight of the three-year-olds and yearlings was. I would say that we left the Pitchfork Ranch with these cattle between six and eight o'clock. I was with these cattle from the time they reached the Pitchfork Ranch until they reached Cody and were loaded, excepting when I was in bed and eating my meals. I helped with the drive. I could not say exactly as to the date when we left Pitchfork Ranch with the cattle. If it is a fact that the cattle were shipped out on the sixteenth I would state that the cattle left the Pitchfork Ranch on the morning of the twelfth day of July. They went about seven miles or eight miles on that first day to Rawhide Creek. The watering conditions there were [fol. 126] very good; they got a good fill of water there. They stayed at Rawhide Creek overnight. I would say that we left Rawhide Creek the next morning between five-thirty and seven-thirty o'clock. That day we drove them from twelve to fourteen miles to Meeteetse Creek. No period was taken off for rest during the drive that day. They did not stop at the noon hour. I would say that they reached Meeteetse Creek between five and six o'clock. That was about fourteen miles, or from twelve to fourteen. They bedded down and stayed there that night. The watering conditions there were very good. They got a good fill of water there. That would be the end of the second day. On the morning of the third day they started between five-thirty and seven o'clock. On the third day we went between twelve and fourteen miles to just across Sage Creek. We made a stop during that day for rest. I would say the stop was made from eleven to one o'clock. There was just a very small spring for watering purposes at that point. The cattle did not get a fill of water at that spring, because there was not enough water there for them. The cattle had a chance to get water at Sage Creek that evening as we crossed the creek and the ditch on the other side of the creek. At Sage Creek there is a bridge across the creek there. They cannot water both above and below that bridge. They cannot water below. I would say that there is a space of between eighteen to twenty feet between the bridge and the fence of the lane for watering. The cattle got some water thert that night but it was not what might be called a sufficient amount. One reason was that there was not enough watering space there for them. After the first few head had water it did not bother much at Sage Creek but at the ditch there wasn't but very little water in it to start with.

Q. How was it at Sage Creek as to whether or not they got it muddy?

A. Well, they did.

Mr. Enterline: He just said it didn't bother there.

It muddied it up a little but there was enough water running to wash the mud through that small place.

The only opportunity which was given the cattle to water there at Sage Creek was as they passed through. There was no stop there. I would not say how fast they were driven across that creek, but we kept them moving. The size of the creek at that place was from four to six feet wide and from two to four inches deep. The ditch was from eighteen to two feet wide and an inch to three inches deep. After passing that ditch they went up on the bench just above. We bedded them there that night. We left the next morning between five and seven o'clock. We went about ten miles on that day to Cody Canal at Cody, Wyoming. We did not make any stop through the day for rest. I would say that we reached the Cody Canal about two or two-thirty. The cattle were watered there; they got a good fill. I would say that they completed watering at that point between four and five o'clock. After the watering had been completed they were held above the ditch for water, or for grazing. [fol. 127] The closest point away from the ditch was possibly five hundred yards. After watering they grazed there on salt sage. There may have been other feed there but it was very little. There was a very good quantity of salt sage there, considered very good salt sage. It was green and very soft. In my experience I have not had occasion to observe the effect of salt sage upon cattle. That is the first time that I ever saw cattle held upon salt sage. There is no salt sage upon the Phelps Range from which the cattle were taken. There was a difference in the feeding of the three-year-olds and the yearlings at the Cody Canal. Most of the three-year-olds fed, and most of the yearlings bedded down there. The cattle did not get a chance at the water again that day. We moved the next morning between four and six o'clock. We crossed the Cody Canal that morning. No opportunity was given to the cattle to water at that time. As to the condition of the range between Pitchfork

Ranch or the Ninety-one Ranch and Cody, the cattle could not get a fill as they were traveling; there was not sufficient feed for that. The range conditions between those points generally was what might be called an average. Between Sage Creek and the Cody Canal, the last day of the drive, there was not any grass for feed. From Sage Creek to the Cody Canal, the last day of the drive, we traveled a pretty good gait We had orders from Mr. Sales, the foreman, as to what we should do in moving them along. When we first left he told us to keep them moving.

Q. Did he tell you what you should do to keep them moving?

A. Well, we took our slickers down and hazed them along for a little bit.

We had our slickers tied on the back of our saddle and we untied them and rattled them and whirled them around in the air. That was with the idea of frightening them to make them move faster. We did not use any other devise that day to make them move faster. We did on another day on the drive. Before or just about the time we started to drive them after they had fed tin cans were used. We used them on ropes. We dragged them along behind the horses in order to get effect from them and make noise. As we drove into the Cody the morning of the sixteenth and crossed the Cody Canal no opportunity was given the cattle to drink. Generally speaking, the nature of these cattle was wild; they were just range cattle. As to whether or not you can drive such cattle as those across a stream, even though they may be thirsty, without drinking, that is a stream the size of this canal, I would say they may want water but then you can get them across.

After crossing the Cody Canal we drove the cattle down the line there for about a quarter of a mile to the bench above Cody which was open, down from the hills, across the bench above the town of Cody; then down off from that bench across to another bench, a short bench, *a* down that bench across the bridge and upon to another bench [fol. 128] where they were held. When we got to the bridge I left for breakfast. I was gone possibly an hour and a half for breakfast. When I returned to the herd the cattle were on the second bench above the bridge being held there and worked. The three-year-olds were being separated from the yearlings. I assisted in that. I was holding herd; I was holding the main herd. The man who cut out the individual animals just rode in, singled out one and if it came handy they would take two and chase them out, generally they chased one out. It took possibly between two to two and a half hours to cut out these yearlings from the three-year-olds. During that time the herd was under more or less of a movement. I would say that it would have a tendency to heat them a little. I should judge that we started to load them in the cars just about ten o'clock. If I remember right the three-year-olds were loaded first. After they were loaded the cars in which they were were on the track. To the best of my recollection I would say that the loading was completed between three and four o'clock. I was not there when the train pulled out. As to whether I heard a conversation in regard to overloading between Henry Lentz and Mr. Sales, the foreman, I cannot say there was a conversation. There was something said about overloading.

Q. What was said?

A. Henry Lentz said——

Mr. Enterline: Just a moment. What was said by who?

Mr. Reynolds: Well, either one or both of them.

Mr. Enterline: I object to what Mr. Lentz said.

Q. This was said by Mr. Sales, the foreman?

Mr. Sales replied to him. Mr. Lentz said that he thought some of the cars had too many in, and Mr. Sales said "shove them in, it won't hurt them."

Cross-examination of Harold Hill by Mr. Enterline:

I have had experience around cattle off and on since the year 1913. I worked for the Phelps Cattle Company, Knight & Watson Cattle Company, R. E. Woods. I am working for Johnny Yates at Cody, Wyoming, now. I am working as a teamster; I am not working cattle. I would say that it is between forty, forty-five or forty-six miles from the Pitchfork Ranch to Cody. I would say it is between forty and forty-six miles. It may possibly be forty or forty-one miles. When we started with these cattle the first day we only went seven miles. They had good feed and good water. There was nothing unusual about that first day's trip. They had plenty of rest during the night and started out between six-thirty and seven-thirty o'clock the next day. There was nothing extraordinary or unusual about that day's drive. They got feed and got water. When we started out the third day there was nothing unusual until after the noon rest. After the noon rest the cattle were thrown in the bunch and trailed. That is not the customary way. As a rule a man does [fol. 129] not bunch his cattle if he is trailing them. In the afternoon after they were bunched we went about four and a half to six miles. That was not a very long drive. Other than bunching them I saw nothing unusual about handling them from then on except in the lane at Sage Creek. They were jammed through there. I would not think that they were hurried through there or pushed through there on account of the fences breaking down. There was good stout woven wire fence on both sides. They passed right through and over Sage Creek. I have been around cattle long enough to know that if they are thirsty they will drink if they have a chance to. As a matter of fact, cattle will go towards water if they smell it, and go towards it if they are thirsty, and you cannot keep them away from it. On the next day, the fourth day, the day we arrived at the Cody Canal, there was something unusual about that. The next day before we got to the Cody Canal we had to hold them to keep them from stampeding for water. They went for water that time and they got it too. There was nothing extraordinary about that, because that is just exactly what cattle do. They had their fill of water there that night. We started out rather early the next morning. I was with the cattle that night, all night. The next morning I was with the cattle until we reached the bridge at Cody. I went to breakfast then and then I was not with them at that time. I have aided in shipping just one shipment of cattle before. That was a shipment for Mr. Phelps.

Q. And when you got over there I take it that you went through the usual custom of cutting them out and handling them just as you did before, or was there anything extraordinary in this case?

A. There was nothing extraordinary until we got to the stockyards.

When we got to the stockyards we went to cutting out the yearlings or the cattle according to their ages. We cut them out just as we did on this day. There wasn't anything unusual about cutting them out. We did the best we could. We did not use any rough methods in cutting them out. We simply did what we had to do in separating them. We then loaded them on the cars just as I had assisted in loading the time before that I have testified about. That morning we started out from the canal over there about four or five-thirty I should say. We went right over the canal and another ditch. There was not much water in the other ditch. There is quite a flow of water in the Cody Canal. We had to take the cattle over that canal. There is lots of water there and very good quality of water. I used my slicker the day before loading. That was before the time that the cattle were running for water when they stampeded that I was using the slicker. The cattle began to run for the canal for possibly a half mile before they got to the canal. Henry Lentz, whom I said was talking to Sales, was a cowboy at that time; he is deceased now. At that time Mr. Lentz was afoot and Mr. Sales was in the horse pen horseback in the stockyards. I do not remember now what cattle they were talking about. I do not know whether it was the yearlings or three-year-olds. Mr. Sales said: "Shove them [fol. 130] in, it won't hurt them." When we got through loading I did not notice other cars standing there on the track.

Redirect examination of Harold Hill by Mr. Reynolds:

The other shipment that I referred to was in June of the same year. It was the first or second week in June. The weather was not as hot then as it was in July at the time of this shipment. I spoke of the cattle being bunched on the third day in the trail. I could not say as to what effect that would have upon the cattle any more than crowding them. By bunching them I mean close herding. On a hot day that might tend to heat them a little.

Recross-examination of Harold Hill by Mr. Enterline:

When we arrived at Cody the cattle were a little more gaunt than they were when we started. I would not say that they lost anything in flesh in that drive of four days.

J. F. Sells, a witness called on behalf of the defendant being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

My initials are J. F. I live at Laurel, Montana. In the summer of 1917 I was living at Billings, Montana. My business is railroad conductor for the Great Northern Railway. I was so engaged in the summer of 1917. I was conductor of the train in question from Mossmain to Judith Gap. I was called that day, as near as I can remember, for twelve-thirty A. M. I had recently returned from another trip. As near as I can remember I had returned at three-thirty or between three and four P. M. of the day previous. The rule of my employment is that crews must run first in first out. As near as I can remember, at the time I responded to the call I was the first one that could be called. I cannot remember whether there were any other crews at that time that could have been called as early as I was called. I remember whether or not I was the first in and therefore would be the first out. I reported at the Great Northern yard office in Billings to take my caboose and engine for this train. I was assigned an engine for this trip. It was what is termed a Mikado type of engine. That is a larger and faster type of engine compared with other engines in use upon the road. We had some trouble and difficulty in getting the engine. The engine was derailed at the roundhouse, on the turn-table. I was maybe an hour and a half after I got there before the engine was put back on the rails so we could start. During that hour and a half the men worked on it constantly to put it back on the rails. I would say that the time within which that work was performed was as reasonable as it could have been done. When we found that this engine was dertailed we did not take another engine to save time, because another engine could not be gotten out of the roundhouse on account [fol. 131] of this engine being on the turn-table. In getting engines out of the roundhouse it is necessary that they all pass over this particular turn-table. After the engine was placed back on the rails we brought her out in the yards. We then switched out the caboose and went over on the N. P. main line. We then proceeded to Mossmain after procuring orders. We received our orders at the union station. That took us possibly fifteen to twenty minutes. On arrival at Mossmain I went to the depot for instructions. An operator by the name of Schwartz was in charge at the depot that night. I received instructions that I was to take a train of cattle to Judith Gap. I would judge that the temperature that night was cool, as I wore an over-garment; I wore a light mackinaw. I never wore that except in cool weather. After reaching Mossmain I checked the train over. At that time it was standing on what is known as the passing track. That track is east of the depot. There was no other track on the north side or northerly side of this track on which the train was, that is the side towards Great Falls. On the south side of that track there were two main line tracks of the Northern Pacific railroad. No cars ever stand upon that main line of the Northern Pacific. The Mossmain depot had not been burned at that time; it was still standing. Defendant's Exhibit No. 6 which you show me and which is a photograph is a correct representation of the track and ground conditions looking towards Billings from the Mossmain depot.

Mr. Reynolds: We offer this in evidence.
Mr. Enterline: Well, was that at that time?

Q. I will qualify that. At that time, Mr. Sells?
A. Yes sir.

Mr. Enterline: No objection.
By the Court: Let the record show that it is received in evidence without objection.

(Which said Defendant's Exhibit No. 6 was thereupon received in evidence and is by this reference made a part of this bill of exceptions.)

Again referring to this picture, it indicates which track this train stood upon. As I look at the picture I can designate which track it is; it is the track to the left.
Q. East and west, as you look at the picture, it is the track to the left?
A. Let me scrutinize it more closely. That is the track, but not an exact photograph of it at that time.
It differs from the conditins at that time in that that switch stand was not there at that time. It is a correct representation of the tracks as the cars stood on them. The train of cattle stood on the track to the left. Defendant's Exhibit No. 7 which you hand me is a correct representation of the track conditions and ground conditions to the [fol. 132] west of the depot, that is towards Great Falls, at the time this train was there.

Mr. Reynolds: We offer this in evidence.
Mr. Enterline: No objection.
By the Court: Let the record show that it is received in evidence without objection.

(Which said Exhibit No. 7 was thereupon received in evidence and is by this reference made a part of this bill of exceptions.)

This second picture which you have shown me shows a continuation of that same track upon which the cattle were towards the west. As I look at this picture it is what as is known as the passing track; it is the track to the extreme right of the picture. That is the same track which was to the left in the other picture. Upon coming into Mossmain and checking over the train I observed the condition of the cattle. I observed it from the caboose. As I observed it from the caboose the caboose was moving. At that time I did not get any more than a casual observation of it. While at Mossmain I made an examination of them so that I could tell particularly as to what their condition was. I made the examination possibly fifteen to twenty minutes after arriving at Mossmain. I observed from three to possibly five head down in each car. I had a conversation with Mr. Wright, the man in charge. At that time there was no discussion, I just mentioned that the stock were down. I did have a conversation with him later. I had that conversation during the movement of the train between Mossmain and Judith Gap. At that time he said that he attributed the fact of the cattle being down was want of water, and that the previous day they had been driven some disance, I do not recall what it was, and that they had been loaded up into these cars without water.

(Noon 12-13-20.)

After reaching Mossmain on this night in question, before starting on the trip from Mossmain to Judith Gap, in the usual course of getting a train in preparation to go the engine took water and the caboose was put on the rear end of the stock train and the cars were inspected, the air was tested. As near as I can recall we moved out of Mossmain at five A. M. During the time spent at Mossmain, and from the time we arrived there until we moved out, there was nothing that was not usual or customary in taking my train at a division point.

Q. Was the time consumed the usual and ordinary time for such purpose?

Mr. Enterline: Well, we object to that as incompetent. The witness can testify as to what time it did occupy, and it is a question for the jury as to what is a reasonable time.

By the Court: Overruled.

A. Yes.

[fol. 133] We arived at Judith Gap at nine forty-five A. M. The distance between Mossmain and Judith Gap is one hundred and two and eight-tenths miles. We made two stops enroute—one at Comanche and the other was at Cushman. We stopped at Comanche approximately thirty minutes. The occasion of that stop was to re-brass a car. By re-brassing a car I mean making it safe for movement. A journal running hot is the condition that requires a re-brassing of a car. It is brassing a bearing for the journal. That is nothing unusual in railroading. When a bearing becomes hot and is burned out it is absolutely necessary that it be attended to promptly. During the time we stopped at Comanche I observed the condition of the cattle. I would say that about the same number were down at that time as were down when we were at Mossmain. While we were at Comanche the attendant came out and worked with them to get them up on their feet. No one assisted him, we did not stop that long. We stopped at Cushman ten minutes for the purpose of coal and water. That was a customary stop for that purpose. That time was not an unusual time for that purpose. At Cushman I observed the cattle. As to their condition there compared with what it had been at Mossmain, I did not make any particular inspection, but I would say that there were about the same number down—from three to five.

We made no stop between Cushman and Judith Gap. After reach-
ng Judith Gap I did not observe the cattle. Between Mossmain and
Judith Gap there was no rough handling of the train on the part
f the crew or engineer. There was nothing that was unusual in
he movement of an ordinary freight train or stock train.

Cross-examination of J. F. Sells by Mr. Enterline:

I did not run all the way through to Great Falls; I stopped at
udith Gap. I stated that I was the first out. I knew that by the
act that I was called. I do not know whether anybody else had
een called. So far as these times are concerned, of my starting, I
lid not make a record of that. They have a register at the station
vhere you start out with the train, a train schedule, signed both
vhen I come in and when I go out. There is a register there and
here was on that occasion. That register would have some showing
s to when I went out at Mossmain. I keep no independent record
nyself on any book or record kept by me other than the train reg-
ster. I do not register at every station where I stop pursuant to
ny orders and register out again. On that occasion I registered at
Billings in addition to Mossmain. As soon as I am called I am re-
uired to register as soon as I get to the depot—in other words that
s my time of reporting for duty. I am registered there and also
egistered at Mossmain when I went out with the cattle. I registered
lso when I got into Judith Gap. A train and engine crew consists
f five men, that is the engineer and fireman and myself and two
rakemen. When I got to the depot that night reporting for duty
first learned that the engine was off the track possibly twenty
ninutes afterwards. I went over there until the engine was put on.
fol. 134] I do not recall who was working or how many men were
orking putting that engine on, but five or six men. The engine was
ut on I think in an hour or an hour and a quarter. We then came
ut in the yards and switched the caboose out. I do not remember
he time when I received my orders to proceed to Mossmain by
irtue of any dispatcher's orders; that is a matter of record in the
ailroad office. I got to Mossmain between three-thirty and three-
orty A. M. After I got there I went to the station for instructions.
found out where my cars were and what I was to do. Prior to that
ime I had received orders as to where I was to go and what I was
o do. I had received them at Billings. I went to the office for fur-
her instructions to get an idea of where the cars were and what I
as to get. I saw the cars when I came in there. When I came
n there and after I got there I learned there were thirty-two cars
n the track. Those were the only freight cars on the track there.
knew when I left Billings that I was going towards Great Falls
r in that direction, towards Mossmain. In a case of this kind,
efore starting out I would go to the depot for instructions and then
et the numbers of the cars and find out where the cars were. I
ould then take my book and go along from car to car and put the
umbers of the cars on my record on my book. In addition to that
assisted there at Mossmain with the switching, putting the caboose

on the train. We took the caboose up along from Billings. There was nothing in particular to do with that except to put it on the back of the train. In the taking of these numbers all I have to do is take the number of the car and put it down and walk along; there is nothing particularly tedious about that. I would suggest that from the time I reached Mossmain about forty minutes total time was occupied by me in switching and taking the numbers of the cars. During the rest of the time before we started some time was consumed in getting the stock up on their feet. The man in charge of the cattle did that, assisted by the brakeman. The brakeman's name is Mr. Schrapps. I cannot state approximately what time was consumed in doing that. We then started out towards Judith Gap. I stated that we made a test of the brakes. The test that was made was setting the air.

Q. That only takes a few minutes, doesn't it?

A. Well, the air has to be pumped up; the air has to be pumped up to fill the airline. It takes from twenty minutes to charge the airline; it takes from twenty to thirty minutes to charge an airline of thirty-two car lengths and test the brakes. They tested all right and worked all right. I would say to this jury that there was nothing unusual in the run from there to Judith Gap, no sudden stops or starting or jerking of my train other than I always do. There was no jerking at all, nothing unusual. When I arrived at Judith Gap I did not pay any attention to the condition of the cattle there. I left the cattle right away. I do not know what occurred after that. I am thoroughly familiar with the condition around Judith Gap.

Redirect examination of J. F. Sells by Mr. Reynolds:

[fol. 135] Speaking of the night being cool, there was a slight breeze stirring that night. In testing the air of a freight train they test the entire train and do not test for each car individually.

Mr. Schraps, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I live at Laurel. I am a trainman. I occupy the position of brakeman in the train service for the Great Northern railroad. In the summer of 1917 I was living at Billings, doing the same business. I have followed the train business five years. I was one of the brakemen who took this train in question from Mossmain to Judith Gap. I was called for about twelve-thirty. If I remember right it was eight hours before that time that I had just returned from a trip. After getting to Mossmain I started looking over this stock. We got there about three-thirty. The night was cool. I have reason for remembering that it was cool because I remember I was wearing a lumberjack shirt. That is a garment which I wear only for warmth; it is an outer garment. There was a breeze stirring that night. After reaching Mossmain I observed the cattle and there was a few of them lying down. I should say from about two to five in each car. I had something to do towards helping get them up. I helped the man in charge who is Mr. Wright. There were no cars on tracks adjoining the track upon which this train was standing. We left Mossmain at approximately five A. M. Number forty-three, the passenger train from Billings to Great Falls, was moving from Billings then at six ten. We got to the Gap at nine forty-five. We reached there before forty-three. We made two stops on the way, at Cushman and Comanche. The occasion of our stop at Comanche was to re-brass a car. That was absolutely a necessary thing to be done at that time. That was an ordinary incident in the transportation of freight traffic: It is a usual or common thing. Brassing a car is done for the reason that the journals run hot. When a journal gets hot like that it is always necessary to put in a new brass. I did not look the cattle over at Comanche. We stopped at Cushman for coal and water for ten or fifteen minutes. Our stop there was nothing more than ordinary. I observed the cattle at Cushman. Their condition as compared to what it was at Mossmain seemed to me to be that there were a few more of them down. We did not make any stop between Cushman and the Gap. After getting into the Gap I looked over the cattle again. Their condition then as compared to what they were at Mossmain appeared to me to be about the same as they were at Cushman. Between Mossmain and Judith Gap there was no rough handling that I remember of; there was nothing that was unusual in the ordinary transportation of live-stock freight.

[fol. 136] Q. What is there in your mind that particularly calls your attention that it was breezey that night?

A. Where at Mossmain?

Q. Yes.

A. I know it was a cool breeze: I had this lumberjack shirt on for one reason.

There is no particular reason to call my attention to my lumberjack shirt. I just remember that.

Q. What did you wear the night before you were out on the train; did you have your lumberjack on then?

A. I was not out the night before?

Q. Well, the last time you had been out before this particular night?

A. No sir.

Q. What?

A. No sir

I do not remember when I had it on after that for the first time. It is usual in the hot summer months of July along Mossmain there to find it a rather cool place at night. On the railroad tracks especially. I observed that since I have been railroading, the railroad track is a particularly cool place at night, yes sir.

Redirect examination of Mr. Schrapps by Mr. Reynolds:

Q. Mr. Schrapps, your experience in the nighttime has been largely on railroad tracks, has it not?

Mr. Enterline: We object to you testifying, leading and suggestive.

By the Court: The objection will be sustained; it is leading.

My experience at Mossmain has been principally in my service.

Recross-examination of Mr. Schrapps by Mr. Enterline:

I have been off and on railroad tracks in my lifetime; I am not always on the railroad track.

Redirect examination of Mr. Schrapps by Mr. Reynolds:

After this affair took place I talked with officials of the road or the claim agent relative to this matter. That would have something to do with calling my attention particularly as to what the night was and what I wore.

Mr. Enterline: Do you mean the claim agent suggested it?

Recross-examination of Mr. Schrapps by Mr. Enterline:

I do not remember when the claim agent talked to me.

[fol. 137] Weasel Head, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

I am the assistant to the chief of police on the Indian reservation at Browning.

Q. You have discussed the condition of the Pitchfork cattle on the Indian reservation with me sometime last week?

A. Well, you mentioned about something about the cattle shipped in for Russell Thorpe and Galbraeth.

Q. Now, if you will put yourself back in the situation that you were then and forget the court-room, where did you first come in contact with the cattle that Thorpe shipped there?

A. Where did I first see them?

Q. Yes.

A. At Seville.

That was in the month of July, 1917. My object in going there was that I was hired to go down and work.

Q. And who was the foreman that received the cattle?

A. Well, I seen Reynolds come there with them.

Besides Reynolds there were Thorpe and Jack Galbraeth and Tom Aubrey and James Eaglesharp, and there was Red Fox, Wolverine, and there was another cowboy came with Reynolds—I do not know his name. There was a man named Cassidy there at that time. I do not remember what his first name is. I saw the animals unloaded.

Q. What was their condition when they were unloaded, and how did they act as to whether they were weak or otherwise?

A. Well, when we was unloading them they looked pretty gaunt.

Q. How gaunt would you describe that?

A. Well, if a horse or animal never had anything to eat or drink for a day or so he gets pretty well gaunted up.

Q. How would you compare it with other animals that have been unloaded from railroad cars; were they gaunted more or less than those?

A. Well, they were pretty well gaunted up.

Q. As though they had taken a railroad journey, or how?

A. I guess on account of the railroad journey.

Q. Were they any more gaunted than any other animals that you have seen unloaded on the reservation from railroad cars?

A. Well, I never have been hardly around any cattle that was unloaded much at all.

Q. Well, how were they as regards—aside from being gaunted, how were they as regards being weak or otherwise, or active?

A. Well, they were acting pretty good; of course, they were weak.

Q. How were they as regards when they came off from the cars; how did they act?

A. Of course they rush out of the cars, I guess on account of being so gaunted and hungry; wanted to get out and feed.

When they were out on the plains they acted all right. I had something to do with taking them to the lease. After that I was out to the lease with the cattle about a week, I guess. I was with that outfit I will say about a month, or almost a month, altogether. In [fol. 138] the course of the drive to the lease the animals drove all right, right along. After they got on the lease, as regards the animals' strength, they acted pretty good. There was nothing the matter with them when I left them at the end of the thirty days, not that I know of. I could not say whether I saw any bruises on them. I have not raised much stock on the reservation myself. I never had any cattle in my life; I have had horses. I have worked on a good many roundups.

Cross-examination of Weazel Head by Mr. Enterline:

I could not say whether these cattle looked as if they had been only about twelve hours on the road. I could not tell that. They looked pretty badly gaunted and weak.

Q. Do you know whether you went with this particular bunch that had been taken off at Great Falls, or some other cattle, which?

A. Which?

Q. Do you know that these cattle came in from Great Falls?

A. Well, they came in from some place.

Q. Well now, did you go off with these weak ones?

A. How did I go?

Q. Did you go with the ones that went with these weak ones?

A. I went with the cattle that came to Seville.

Q. Well, I mean these weak ones?

A. Well, I guess they is the cattle you was talking about.

F. C. Newcomb, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

My initials are F. C. I live at Judith Gap, Montana. I am yardmaster for the Great Northern. I was employed by the Great Northern in 1917 at Judith Gap; I then had the same position I have now. I remember the occasion of this shipment coming to Judith Gap. I saw the train as they pulled by the office going into the yards; that was the only time I saw them. I had a conversation with Mr. Wright relative to signing a thirty-six hour release. The train dispatcher asked for a thirty-six hour release, or to have a thirty-six hour release signed, and I sent word to Mr. Wright to come to the office to sign it. I asked Mr. Wright to sign a thirty-six hour release. It was the intention of the train dispatcher to try to get the train through to Seville within the thirty-six hour limit. I think he said at first that he had no instructions or authority to sign such release, but being in charge of the stock he signed it as customary; he made no protest or objection particularly to it. He did not make any request upon me to unload them there at Judith Gap. I had no conversation particularly with him about unloading at Judith Gap that I remember of. There was something said about unloading at Great Falls. After he started to leave the office he said he would like to get the train unloaded at Great Falls; that the cattle were down bad.

[fol. 139] Q. Did he give any other reason than that, that the cattle were down bad?

Mr. Enterline: Well, I wish you would ask the witness what he said.

(Question read.)

A. No other reason particularly any more than the cattle were down bad in the cars.

Q. Did you in—then send any message to the dispatcher?

A. Yes sir, I wired the train dispatcher.

Mr. Enterline: Now wait a minute. If there was any wiring, that will show for itself unless it is lost.

Q. Did you know whether or not the cattle were all up when they left Judith Gap?

A. I understand they were up——

Mr. Enterline: Now, I object to what the witness understood and move to strike it out.

By the Court: Strike it out.

I do not know for certain whether or not the cattle were all up when they left Judith Gap. After Mr. Wright spoke to me regarding unloading at Great Falls I made arrangements for that purpose. I believe that request from Mr. Wright was made during the process of making out the thirty-six hour release; I think it was after he signed the release as he was leaving the office.

Cross-examination of F. C. Newcomb by Mr. Enterline:

I would not be sure as to whether it was during the process of making it out. I would not be sure whether it might have been. I am a yardmaster and I live there at Judith Gap. I have lived there for some years. I am still living there now. I made no examination of the train at all. I just saw the train passing the office. The train agent did not tell me to send for Wright or the caretaker to have him sign the release; the station agent had nothing to do with it. I sent for him myself. I was in communication with the dispatcher at Great Falls. An ordinary livestock run from Judith Gap to Great Falls is five and one-half hours to six hours. I believe that train was in there at Judith Gap at nine forty-five on the morning of the seventeenth day of July.

Redirect examination of F. C. Newcomb by Mr. Reynolds:

It was not necessary to have a thirty-six hour release in order to run to Great Falls. In the signing of this thirty-six hour release by Mr. Wright he did not impose any condition that it should be conditional upon his getting to Great Falls.

Recross-examination of F. C. Newcomb by Mr. Enterline:

At the time that release was signed I believe Mr. Wright said at first that he had no authority to sign the release, and I told him that [fol. 140] on the request of the train dispatcher that was handling the train to get a thirty-six hour release and move the train and try to get them to Seville within the thirty-six hour release. Myself and the train dispatcher I suppose did not realize the condition of the cattle at that time. He told me they were down when he wanted to go to Great Falls; he said that he wanted to unload at Great Falls. As to whether it is customary to ask for the release way ahead, before the twenty-eight hours are practically used up, it is usually customary to get the thirty-six hour release when the shipment is loaded.

Redirect examination of F. C. Newcomb by Mr. Reynolds:

At that time I was not acting as both yardmaster and agent; I was yardmaster only.

W. E. Sturdivant, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I live at Great Falls, Montana. I am a trainman with the Great Northern Railway Company. I have been in the railway business about six years altogether. I am a brakeman on the train. I acted as brakeman on the train in question from Judith Gap to Great Falls. I observed the cattle at Great Falls when they came in. I remember the time the cattle came in at Judith Gap; it was at nine forty-five A. M. They left at about ten-twenty. Leaving Judith Gap for

Great Falls on this trip we made stops. We stopped as I remember first at Benchland; I do not remember just exactly how long we stopped there, but it was between twenty and thirty minutes I believe. We stopped at Benchland to meet a train. It was a passenger train which we were to meet there. Our next stop I think was at Stanford. The occasion or reason of our stopping at Stanford was to meet a train. We stopped there thirty or forty minutes I believe. Our next stop was at Armington. I believe we were stopped at Armington somewheres near an hour or around an hour. The reason of the stop at Armington was to meet a passenger train I think. We met two trains there.

Q. What was the lay of the ground at Armington where the train stopped?

A. In what way do you mean?

Q. Well, was it open country or hilly?

A. Well, in the particular place where the train stood there was a bluff on one side and on the other side it was open.

This stop was made on a branch line going to Neihart. Defendant's Exhibit No. 8 which you show me is a correct representation of the track upon which these cars stood at Armington. As I look at the picture it was on the left-hand track.

Mr. Reynolds: We offer this in evidence.
Mr. Enterline: No objection.
By the Court: Received in evidence without objection.

[fol. 141] (Which said Defendant's Exhibit No. 8 was thereupon received in evidence and is by this reference made a part of this bill of exceptions.)

Defendant's Exhibit No. 9 which you hand me is also another picture farther along on the same track showing the correct situation at that time.

Mr. Reynolds: We offer this in evidence.
Mr. Enterline: No objection.
By the Court: Let the record show it is received in evidence without objection.

(Which said Defendant's Exhibit No. 9 was thereupon received in evidence and is by this reference made a part of this bill of exceptions.)

In this picture, as I look at it, the cars were standing on the left-hand track. I would say that the end of the train extended around that bluff, and from that end of the bluff towards me as I look at the picture. As to the condition of the air there at Armington, there was a breeze stirring. I cannot say the exact mileage from Armington to Great Falls, it is fifty miles or thereabouts. There were no other stops between that place and Great Falls. I remember that we reached Great Falls about six P. M.

Going back to Judith Gap, I noticed the cattle there and what their condition was. I noticed several cattle down in the cars; they looked to me like they were in kind of bad shape. I would say that there was an average of around five to a car down. I did everything I possibly could to help get them up. I assisted Mr. Wright. I also did that at the two stops which I have mentioned. I believe there are several other unloading places between Judith Gap and Great Falls; I believe that there could be unloaded at any town where there is a stock chute between Judith Gap and Great Falls.

Q. Well, what would you say as to whether or not there is a stock chute at each of those stations?

A. There is at the stations we stopped at.

Mr. Enterline: Which stations is he testifying to now?

Mr. Reynolds: Judith Gap and Great Falls.

I was not present at the time the thirty-six hour release was signed. I did not have any conversation with Mr. Wright about the thirty-six hour release. I believe I did have a conversation with Mr. Wright relative to unloading at Judith Gap. While we were bunching the cattle up at Judith Gap there was a conversation held between him and myself. I believe there were two or three other parties present, or one or two at least, relative to the condition of the cattle, whether or not they should be unloaded at Judith Gap. I am quite sure, quite positive, that I asked him why he did not unload at Judith Gap, and he said it was almost impossible due to the fact that he had no riders and no men to help him handle the cattle, and also because he did not have the authority to do that.

[fol. 142] Now, returning again to Armington, as to the situation of the track there relative to the mountains, it is right in the foothills. The track goes up a sort of canyon.

Cross-examination of W. E. Sturdivant by Mr. Enterline:

I was the brakeman with that train. I do not fix the time at nine forty-five by looking at the schedule since. We were called for nine forty-five. I could not say what time we were called for the day before. I could not remember the time I was called for the day afterwards or at any time afterwards. The reason why I am able to remember this particular nine-forty-five of this particular day is that under a condition of this kind in handling cattle and a train of this kind and circumstances happened as they did I could not hardly forget it. I mean by that that the cattle got in such bad shape afterwards that my attention was afterwards called to it. In my estimation their condition at Judith Gap would be called bad. I do not live at Judith Gap; I live at Great Falls. At that time I did run in and out of Judith Gap, for three months prior to that. I have not gone in and out there much since, possibly a couple of times is all. I knew the conditions around there then. In the two months that I was there at Judith Gap I handled stock trains quite frequently. The photograph of the bluff that has been introduced in evidence is near a place called Belt. Belt is about two miles from there. Belt is the next station from there towards Great Falls. Belt is a little farther west. I could not say positively now as to the directions which the track runs there. I did state that there was a breeze stirring there that day at the bluff. There was a little more than there is ordinarily out on the flat. I would not say there was any breeze at Judith Gap. The breeze there blows right alongside the bluff. Almost always there is a breeze there. I would say it was a pretty warm day that day; it was pretty warm weather about that time. We arrived at Great Falls at six o'clock. I stated that some places in between Judith Gap and Great Falls there are some chutes. I suppose that is true at a great many places where there is no watering facilities at all, that there are stockyard chutes where there is no water at all. I do know whether there is water at those places along, between Judiah Gap and Great Falls?

Q. Where? I mean watering facilities at yards to handle thirty-two cars of cattle?

A. There is a water tank at Stanford.

Q. A water tank?

A. Yes sir.

That is to water for the purpose of the engines taking water. Cows do not generally drink out of the tank; they don't take water like the engines. The cattle could be watered there by this tank.

Q. How, in buckets?

A. There are troughs as a general rule at the ordinary chute.

Q. I don't care as a general rule, what do you know about it, that is what I am trying to get at; what do you know about any [fol. 143] troughs along at any of those places? If you know anything why tell us about it.

A. Well, in what way do you mean, what do I know?

I know that there are watering troughs there at these yards between Judith Gap and Great Falls to water stock. There are water troughs at Armington, Stanford and at Hobson. I will also say to this jury that there are corrals and facilities there to unload cattle and water them, a trainload of thirty-two cars. There are corrals and facilities at Armington to unload and water a trainload of thirty-two cars of cattle. Armington, Stanford and Hobson are the only places where I could say that positively.

Leading up to the conversation that I claim I had with Wright, one person, the conductor of the train, was present in particular when I had the conversation with him, and I would not say positively who the others were. I was not present when he was talking about the release with the yardmaster or station agent. I was down on the train. That happened up in the depot I guess. I would not recall the exact words of the conversation which I had with Mr. Wright at that time, but it was to this effect: I told him I thought the cattle looked bad and asked him why he did not unload at Judith Gap, and he said that it was almost impossible for him to do it, owing to the fact that he did not have riders or horses to handle the cattle, and that he did not feel—he did not have the authority to do it. I won't say those were the exact words, but it was words to that effect. I would not be positive of any further conversation which we had outside of the ordinary conversation about stock. As to whether I remember any conversation he had with me there at Judith Gap other than I have told, we were right together, I was right with him practically all the time the train stood at Judith Gap, and we were conversing all the time and I do not recall any particular part of any conversation.

I know of the watering facilities at Great Falls that they have up there. As to whether the watering facilities at Great Falls were as good as those along the line, or better at Great Falls than the ones I have testified concerning at these other stations, I believe the troughs were longer and larger at Great Falls.

Redirect examination of W. E. Sturdivant by Mr. Reynolds:

During my conversation with Wright the matter of how the cattle had been driven was brought up. I would not say positively that I asked him, but it was either myself or someone else there asked him the cause of the cattle being in this shape, and this was what Mr. Wright said: He said they were driven pretty hard the day before and in his judgment were not handled as good as they could have been. I think that he meant they were not handled as good as they could have been the day before they were loaded. Regarding these places which I mentioned where there were watering facilities along the line, I have not seen cattle or other stock unloaded at those points and watered there. I, personally, have not unloaded stock at those [fol. 144] points. As to whether the situation there at the river at Armington is such that it would be available for watering stock, I would say that I am not a cattle man, but I think that all the stock that you could get into that canyon there could drink out of that river.

John Ewinsky, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I live at Great Falls, Montana. My business is railroading, in the operating department. I occupy the position of conductor in the railroad service. I am a freight conductor. I have been working in that capacity for four years. I was employed by the Great Northern Railway Company as freight conductor in the summer of 1917. I had charge of the train in question from Judith Gap to Great Falls this trip. I reported for service on this trip from the Gap to Great Falls at nine forty-five A. M. of that day. I looked over the cars at that time and observed the condition of the cattle. At that time brakeman Sturdivant and an extra gang which was there or a section crew, I am not sure which, assisted us in getting those cattle up at Judith Gap. As I saw the cattle there there were from three to five down in every car. I had a conversation with Mr. Wright as to the cause of their condition. He said previous to loading that they had had a hard drive for forty or fifty miles. We left Judith Gap at ten twenty. That made a stop of thirty-five minutes at Judith Gap. That was not an unusual stop at a division point; that is getting out in pretty good shape, thirty-five minutes. We made some stops between Judith Gap and Great Falls. We stopped at Benchland, Standford, Geyser and Armington. The cause of our stop at Benchland was to take the siding there for a passenger train. We stopped there thirty minutes, about ten minutes for the passenger train and the rest of the time was consumed in getting the stock up. That twenty minutes was delayed on that one account. Our next stop was at Stanford. The reason for that stop was to take coal and water. We stopped there I should judge between twenty-five and thirty-five minutes. In addition to putting on coal and water we met a freight train at Stanford. No stop was made there longer than was necessary for those purposes. Our next stop was at Geyser. The reason for our stop at Geyser was that we got to Geyser and had probably about fifteen minutes to make Spion Kop for number forty-four, and in going along the train I noticed the cattle all being down and assisted in punching them up, and by the time I got to the depot to get the meet on this passenger train forty-four was due out of Spion Kop then and naturally I had to get in the clear then we had to wait. Our next stop was at Armington. The reason for the stop there was that I had a meet on a freight train and was there for a passenger train also. Effort was made there to get the cattle up. At every stop we had we got the cattle up. There was about fifteen or twenty minutes' delay at Armington on that account. [fol. 145] There was a breeze blowing at Armington. This train stood on the Neihart line. That is in a canyon of the Little Belt mountains, that is the foot hills of the little Belt mountains. As a general rule a breeze is always blowing in that section. This track was at the foot of the canyon. From Armington to Great Falls we did not lose any time; we never made a stop. I brought Mr. Wright into the office at Judith Gap to sign the thirty-six hour release, and as he was signing it I was getting my orders. I do not recall that I heard any conversation regarding it. I do not remember anything about that other than that I asked Wright to come to the office for the thirty-six hour release.

Cross-examination of John Ewinsky by Mr. Enterline:

The usual run for a stock train from Judith Gap to Great Falls is between six and eight hours. One witness placed it at five and a half or six hours, but I have been on the road for quite awhile and six hours is a good run, exceptionally good run. We had a good engine there that day. I fix the times now at these various places by reason of the fact that I have had several interviews on the matter. The Superintendent interviewed me right after the trip was completed, that is probably a day or so after the trip was completed. I had an interview with our Superintendent. After that I had an interview with Mr. Bresnahan, I think his name is, who is the claim agent. That was probably a month or two after the incident or the trip, I do not recall just exactly the time.

When I start out there is a train sheet or register that I sign. As a general rule you are registered the minute you are called, and register for duty, and you complete your register after you receive your orders and get out of town. When you report to the office you put your name down, and whenever you get your orders from the train dispatcher then put down the hour you leave. When I stopped at any places between Judith Gap and Great Falls I did not register out or in at any of those places on that trip. I received some orders from the dispatcher along the route. I received orders at Stanford and Armington, I believe that is the only places. I do not know how long the record of those dispatches that are sent are kept at Great Falls, but they keep a record when they send them. I do not know how long they keep them.

Mr. Veazey: I might state to counsel that I have the order book and that may be submitted.

I assisted in getting the cattle up at Judith Gap, Benchland, Stanford, Geyser and Armington. At Judith Gap there were cattle down in the cars but we got them all up before we left there. Part of them were down, the young cattle, there were some that were apparently resting, the one-year-olds—they were lying down as we left, I believe. We did not get them all up at these other stations. They appeared to be getting worse all the time. When I got to Great Falls I did not go right to my home from the train after I reported in; I stayed [fol. 146] around the train, I stayed at the office when the train was there. The stock train was right at the office when I got off of it. I did some things there in reference to looking after the cattle at Great Falls; I was there when they began to un-load. That was not done immediately when they got in. From the time of our arrival until the unloading had commenced I think an hour and a half had elapsed. I did not stay around the depot an hour and a half after I got in. I did not leave then before they began to unload; I had charge of the unloading. I was not there when they were showered with water. I do not know whether that was done or not; it was not done while I was there. I meant that I had charge of the train during the unloading. There were railroad men there, section men, helping to unload the train.

Redirect examination of John Ewinsky by Mr. Veazey:

As regards unloading, on our arrival, between Judith Gap and Mossmain the train crew or caretaker had had nothing to eat. On our arrival at Great Falls that matter was discussed. I mentioned that we would go and eat, and Mr. Wright says "Fine, I will eat too," and we went to eat. After eating we came and started to unload the stock.

Q. And how long were you in the process of unloading them?

By the Court: As I understand, Judge Reynolds examined this witness in chief.

Mr. Veazey: Judge Reynolds had to leave and did not hear this part of the examination.

By the Court: Very well.

I left at one ten A. M. At that time nineteen cars had been unloaded. In the course of unloading these cars there was no beating with sticks nor brutality that I could see other than the punching of the cattle to get them out of the cars. They would punch the cattle with a short stick, punch them up, from the outside of the car. As regards the journey from Judith Gap to Great Falls, there was no rough handling of the train.

Mr. Schwartz, a witness called on behalf of the defendant, being first duly sworn upon direct examination by Mr. Reynolds testified as follows:

I live at Columbus, Montana. In the Summer of 1917 I was living at Mossmain, Montana. I was then engaged as a telegraph operator for the Northern Pacific. As to whether or not I am an employe of the Great Northern, or have been at any time, I was employed at a joint station between the Northern Pacific, the Burlington and the Great Northern. I recall the occasion of the shipment in question going to Mossmain on the evening of the sixteenth of July, 1917. I was on duty that night. I worked from eleven P. M. [fol. 147] July sixteenth, 1917, and also the night of the seventeenth. I started to work at eleven P. M. and I worked until eight A. M. I was on duty when this shipment came in from the Burlington. These cars in question were placed on the Great Northern west-bound siding. That track is an auxiliary to the main line, sometimes referred to as a passing track. That track is located east of the old depot. There was no track on the north side of that. On the south side there is the Northern Pacific east and west-bound double track. Those were main tracks or through tracks. They were main tracks. There were no cars standing on those tracks on the night in question; no cars ever stand on those tracks except in the moving trains. The temperature that night was between about fifty and fifty-five, and a light southwest wind was blowing. When I say fifty to fifty-five degrees, that is an average temperature for the night. I do not remember that from recollection; I give the weather at twelve o'clock midnight to the train dispatcher every night, by telephone. I give that information to the dispatcher at Livingston. A new contract was signed at Mossmain for this shipment by Mr. Wright.

The defendant's Exhibit No. 10 which you hand me is a correct representation of the yards at Mossmain; it is a correct representation of those yards in the summer of 1917.

Mr. Reynolds: We offer this in evidence.
Mr. Enterline: No objection.
By the Court: Let it be received in evidence without objection.

(Which said Defendant's Exhibit No. 10 was thereupon received in evidence and is by this reference made a part of this bill of exceptions.)

Q. Now, Mr. Schwartz, just step down here where you can point this out to the jury, if you please. Will you please take your pencil and stand to the side here and indicate where the Mossmain depot is?

A. The depot is here.

The main line tracks of the Northern Pacific are represented by these lines running this side of the depot there, on the south side. The passing track upon which the train in question was located is on the north side.

Q. Now, where does the train leave the depot to go to Great Falls, over what track?

A. Over this track here (indicating).

There appears to be a wye there; that is where they set out their empties to go back to the Burlington. .This track on the other side of the wye is the Northern Pacific track connecting with the Great Northern.

Q. And this track here that I am indicating, what is that?

A. That is the Great Northern main line.

That is the main line to Great Falls.

D. Now, where were sheep in question, relatively speaking, to the depot?

A. Well, the stock sat right about in there (indicating).

Mr. Enterline: You better get to the cattle again.

[fol. 148] Q. Yes, I am more a sheep man that a cattle man. Now what is this here, shown as a part of the fence?

A. That there is the right-of-way line.

Q. How far, Mr. Schwartz, is it from this point here around that rack to the depot?

A. About a mile.

The Burlington train arrived at Mossmain at eleven-twenty P. M. on July sixteenth. The Great Northern train left at five A. M. July seventeenth.

Q. Mr. Schwartz, with the Court's permission, I would like—with he Court's permission, to have you mark on this exhibit here in red nk just where the train stood, will you?

(Referring to Exhibit 10.)

A. (Witness marks the exhibit.)

I had a conversation with Mr. Wright regarding these cattle while he was there. I told him that the Great Northern train would not be in Mossmain before three A. M. and asked him if he wanted to take those cattle to Billings and have them unloaded, and also that they had an engine off the turn-table here in Billings and hat it might be considerably longer, and he was very anxious to get hem to Great Falls and insisted on keeping them at Mossmain.

Cross-examination of Mr. Schwartz by Mr. Enterline:

I asked him to take them to Billings on account of the excessive delay at Mossmain. I knew they had only been on the train seven hours. The excessive delay was on account of the engine being off the turn-table here at Billings, just on account of the engine being off the turn-table. That is the only reason that I suggested taking the cattle to Billings. We had that conversation about eleven-thirty. That was then within ten minutes after the Burlington train brought them there. I knew as a dispatcher that they would come that day from Cody. Within ten minutes after the train arrived from the Burlington I suggested to him to take those cattle down to Billings, and the only reason was of the excessive delay that I contemplated on account of the engine being off the track, and on account of the figure that the dispatcher gave me on the train. He did not tell me that the cattle were going down and that they were suffering. I did not know anything at all about that when I suggested that the train could be taken to Billings.

About four-forty A. M., during the course of the night he told me that the cattle were going down and that the train ought to be moved. That was the first time. I said "they ought to go down to Billings" at about eleven-thirty P. M. That was when I told him that the engine was off the track. The figure which the dispatcher gave me on the train was that it could not move until three A. M. When I suggested that he should take them down to Billings he insisted on unloading at Great Falls. He did not want to unload before he got to Great Falls. I do not know whether the engine was off the track at eleven-thirty or not. I know this, that the dispatcher [fol. 149] gave me a figure of three A. M. on the train, and that there was some trouble here in Billings. That report was gotten from the dispatcher by the second trick man previous to my coming on duty. The man that was on duty before I came on duty had received some information from the dispatcher, and that was the information he gave me. He told me that. I could not say as to when I had any communication with the dispatcher direct. I do not just remember when I found out first that the engine was off the track. I cannot tell this jury. I cannot even approximate it.

I gave the temperature at fifty to fifty-five degrees. I got that information from a thermometer which I had. I do not remember what it registered the night before. I do not remember what it registered the night after. I cannot approximate to this jury what the temperature was at any time after or before. I can tell this jury that I recall now, independent of any record, what the record was on the night of July sixteenth on account of the unusual occurrence, on account of this stock there, on account of the long stop at Mossmain. That is the reason that I remember it. I have not refreshed my recollection by reason of any data or record since. I got the time of the train leaving by personal recollection. That is not dependent either upon any record of anything else, only on the unusual occurrence of the stock being delayed. That was an extraordinary delay there at that time. It was one way beyond the ordinary delay there at Mossmain. This train stood on the passenger track east of the depot Right south was the main line of the Northern Pacific. It was held there on that track until the engine came up and moved it on up towards the northwest by the depot.

F. C. Newcomb, Recalled as a witness on behalf of the defendant, having been previously duly sworn, upon direct examination by Mr. Reynolds testified as follows:

Q. Mr. Newcomb, in your former testimony you were asked the question as to what would be the usual time between Judith Gap and Great Falls, and you stated five and one-half to six hours. You may state as to whether or not you would like to qualify that.

A. The usual time?

Q. Yes.

A. Why, I presume I had in mind some of the best times that had been made under the best of conditions.

Our passenger train time is five hours. I would say two hours longer than the passenger train time would be the usual stock train time, seven or seven and one-half hours. Forty-three and forty-four, our best passenger trains between Judith Gap and Great Falls, leave the Gap at one-fifty and get into Great Falls at six fifty. That is five hours. The stockyards there at Judith Gap will accommodate about fifteen cars of cattle and in unloading larger shipments than that they have to be herded out or ranged out for feed and water. There is a place where that can be done. We have done that on [fol. 150] several occasions. For large shipments, for more than one or two cars of cattle, as a rule they drive them down to the creek for water. That is about three-quarters of a mile away.

Cross-examination of F. C. Newcomb by Mr. Enterline:

We have no equipped pens for handling a consignment of cattle such as was there. Any greater number than several cars would have to be herded and taken out to some natural place to water. They are driven out to this stream.

Calvin Hankins, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is Calvin Hankins. I am the assistant road master of the Great Northern Railway Company. I was such road master at Great Falls at the time this occurred. I assisted in the unloading.

Q. How late were you present on the grounds aiding in unloading?

A. I were—was called at about seven o'clock, and I left there at two A. M.

I left the yards at two A. M. I would not say that the caretaker was there also when I came, but he was there during the evening. During the course of that unloading which I observed there was no beating of the animals with sticks. Sticks were used, short sticks, for between the cars, between the slats in the cars for prodding the animals. No pick handles were used. I did not see any pick handles on the job. The sticks which were used were mostly slats, pieces of boards that was throwed off of cars there. There wasn't anything else around there that we could get. The troughs were in fairly good condition; in fact we were unloading and loading stock out of there every day. I was furnishing men to help load and unload stock there about every day. Water was gotten into the troughs in Great Falls yards by two tank cars that we kept at the yards. Those tanks were kept in the yards for that purpose, at the stockyards, to water stock that should come to be unloaded or loaded at Great Falls. I did not notice the troughs leaking.

Q. Were you able to fill the troughs with water, or could you only get a little bit *if* water?

A. Yes sir.

I did not take any part in the reloading.

Cross-examination of Calvin Hankins by Mr. Enterline:

I am the road master there. I was called at about seven o'clock in the evening. My men had charge of the unloading that evening, were assisting in the unloading.

Q. Was that one of your usual duties in the way of unloading stock there?

A. We had charge generally when there was a shipment of stock [fol. 151] and nobody with them, we were always called on to unload them.

I would say those troughs there were in fairly good condition. I did not see any of them leaking at all. We were using them every day.

Q. Now, in regard to your equipment there at Great Falls, have you got equipment, or did you have at that time equipment to take care of thirty-two cars of cattle?

A. We unloaded all those cattle in the pens, yes sir.

Q. Would you say that you are so equipped that you could handle a shipment of that kind?

A. We had them in the pens.

Those nine hundred and eighty-four head were all in the pens except what were down in the cars. As I recall, we had five pens there at that time. I do not recall how many chutes we had at that time. I do not recall how large the pens are, I do not believe I could state that because I do not know. I have been road-master since 1917. I went there in June. I have not remained there ever since. I stayed there until November.

HARRY GLOVER, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is Harry Glover. I was a special agent of the railway company at Great Falls in July, 1917. I am not now in the service of the railway company. My experience in the handling of stock and in sizing up animals as to how they are getting along has been that I followed the range for about ten years in the eastern part of this state in Dawson County, down by the town of Wibaux. I worked for the W-Bar Cow Outfit. My work in Dawson county for that ten year period consisted in helping brand cows and calves in the spring; gather beef herds in the fall and load and ship. From my experience I am able to tell what the condition of an animal is as to whether it is permanently injured, or as to whether it is in good shape from the looks of them.

Q. How late after unloading was begun did you continue with the work of unloading?

A. Do you mean how long was I with them at the unloading?

Q. Yes.

A. From the time they started to unload until the next evening at about six P. M.

I was continuously with the work during that time, on the grounds, from that evening until the following evening at six P. M. I saw the work of unloading. There was no beating of the animals during that unloading. No pick handles were used. There were sticks used to crowd through the slats of the cars in order to compel their attention in order to get them out, no more than in the usual way.

The troughs in the yard were good, that is in holding water. The [fol. 152] troughs could be filled. I could not see that they were leaking any to amount to anything. At any event you could get the troughs full. The troughs were filled by means of two railroad tanks on cars, large tanks, through a three-inch hose running from the tanks to the troughs. The railroad tanks are just tanks constructed on flat cars. There was no shortage there in the handling or unloading of those cattle in the way of water. After the unloading was completed a time came when many of the animals were taken out and grazed in a herd. They were taken outside of the pens and grazed. The balance of the herd, other than those that were sick, was taken outside of the pens and grazed. I was not present at the reloading. I saw that herd while it was outside grazing at a distance but not close. I did not get close to them. I should judge that I was about a quarter of a mile from the main herd I did not get up to the herd itself.

Cross-examination of Harry Glover by Mr. Enterline:

I was working for the special agent at that time in the detective department. I was with every car that was unloaded, or around every car that was unloaded. I was there when every car was unloaded.

At no time was any beating done of the animals, not at all. I do not know what you would call leaking of the troughs, but I know the troughs would be full because they ran over. At any rate, we had no difficulty about that.

Redirect examination of Harry Glover by Mr. Veazey:

My occupation at this time is furnace tender for the Anaconda mining people at this time in the zinc department at Great Falls.

JOHN ANDERSCH, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is John Anderson. I reside in Great Falls. I was not present at the unloading of the animals involved in this shipment. I was present at the reloading.

Q. Were you present when any sprinkling of the animals was done?

A. It was done at the passenger station for half an hour or so.

Q. Were you present at the time?

A. The way I happened to get over there, I seen a stock train there and I walked over.

I was present at the time of sprinkling a part of the cars.

The effect of the sprinkling upon the animals was that some of them tried to get up and shook their heads and looked in a fighting mood.

Q. Did it hurt them, or make them better, as you saw them?

A. Well, they looked mad.

[fol. 153] Q. Did it make them more active or make them lie down?

A. Well, some of them was shaking around and wanted to try to make motion, try to get up.

As regards reloading, I was present from nearly eight o'clock or seven-thirty when they brought them to the corral until eight-fifty. During that time I did not see anybody beating the animals with pick axes or pick-axe handles. It looked to me like cow men were doing the reloading. As to wether there were any men that looked like section men, I could not see any from the place where I was standing.

Cross-examination of John Andersch by Mr. Enterline:

I am not working for the company; I am a hide and fur and wool dealer at Great Falls. Counsel was talking to me about sprinking the cattle. At that time the hose was attached for use on passenger cars; they just kind of sprayed them between those holes in the cars. That is the hose that they used to put water on the trains there. It looked to me like it was a hose to put water in pullman cars and also on top. As to whether it was a little more than a sprinkling, they kind of sprinkled it on them, took the hose. When they were reloading I took Mr. Pewters over in my car to the stockyards. I met him, it was on Sunday, and I asked him if he didn't want to have a ride and he said no he was busy, and I asked him where he was going and he said over on the west side to the stockyards.

I did not tell the railway company anything about what I am testifying now until just a fews days before I came down. They said I had to come on that cattle case. The claim agent did not say so. Mr. Veazey said so. He telephoned me. I was present there when they were reloading from the afternoon until eight-fifty.

Redirect examination of John Andersch by Mr. Veazey:

Somebody representing the railroad company, shortly after the incident, came to me and asked me what I saw there. There was a party came down to see me afterwards but I did not pay much attention to it when he was in my office. He was talking to me about this. It might have been Mr. Bresnahan, it looks something like his face.

Mr. **Pewters**, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

I am General Agent for the Great Northern Railway Company at Great Falls. I witnessed the reloading of these cattle at Great Falls when they were sent out to Seville. I caused some pictures to be taken of the balance of the herd as they were grazing prior to reloading. They were grazed west of the stockyards. The pictures were taken on a Sunday afternoon about three o'clock. Most of the [fol. 154] herd were lying down and were right close to a pond, an artificial pond about a quarter of a mile west of the stockyards. They were loaded that night four or five hours after taking the pictures. While lying down they were resting, had the appearance of cattle that had their fill of hay or feed and water and were resting. They were chewing their cud. Defendant's Exhibits 11, 12 and 13, which you show me are those pictures of the remainder of the herd taken about three o'clock in the afternoon before they were loaded. I went out there with the photographer for the purpose of having those pictures taken.

Mr. Veazey: We offer these in evidence. I take it as counsel introduced pictures of dead animals it would be all right for us to introduce photographs of live ones.

Mr. Enterline: No objection.

By the Court: Let the record show that Exhibits 11, 12 and 13 are received in evidence without objection. (Which said defendant's exhibits 11, 12 and 13 were thereupon received in evidence and are by this reference made a part of this bill of exceptions.)

I was present at the reloading from the beginning to the end, the entire time. There were five or six of the owner's employes doing the loading. The railroad men were assisting at the car doors and gang planks handling the gates. They were not doing anything other than what I have stated at the reloading. It seems to me that they did have something to do with keeping the cattle in motion right at the doors. They would prod through at the openings in the chutes to keep them going. The chutes have openings on them on the order of a fence. They would prod through those to keep the cattle going at times. The cattle men were cutting in the yards and some more of them were driving them to the chutes. Very nearly always one man followed them right on in. In the course of that work there was no brutality either on the part of the cowboys or the railroad employes. None of them beat them with sticks; they didn't have to beat them any. Mr. Thorpe at that time did not make any protest to anyone that I heard about beating them with sticks. During the progress of the reloading I stayed on top of the cars directly above the chute counting. I was on top of each car above the chute and counting the animals as they were reloaded.

Cross-examination of Mr. Pewters by Enterline:

As I recall they began to reload about seven o'clock in the evening and continued until eleven in the evening. A good deal of the loading was after dark. I would say that I did not hear Mr. Thorpe protest. I believe it was my own idea that I should take the photographs.

[fol. 155] Redirect examination of Mr. Pewters by Mr. Veazey:

As regards the protest, if any, made by Mr. Thorpe, I was acquainted with Mr. Thorpe. I believe he knew of my official position. I met him at the train when he arrived in town. There was other railroad men to whom a protest could have been made by Mr. Thorpe as regards the work that was being done there that I would not have heard. He could have made a remark to people that were there in charge of the loading, yes, and I would not have heard it. I was on top of the cars continually. After nine o'clock the night was dark and we had a fuse light. I would have been able to see after nine o'clock if there had been any beating as far as I could see down the chute or into the alley. I could have seen any brutality on the part of any railroad men that were in position to strike any of the animals. I was right close to our men.

Mr. Gruegeb, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

On July seventeenth, 1917, my position was General Foreman. That service was divided, any service that really came up, practically under the track department of the Great Northern Railway Company. As such foreman I assisted in looking after the unloading of the cattle involved in this lawsuit. The unloading started around about seven-thirty in the evening. I happened to get there at a quarter to eight, bringing the assistant road master with me, and I stayed on the scene the entire night, all through the next day until about nine-thirty the night of the eighteenth. I made a memorandum of the animals that were unloaded from each car and the condition of them.

Q. Have you that with you?

A. (Witness produces memorandum.) We pulled down eleven cars from the straight leg of the Wye and unloaded them first, and we found that they were mostly loaded with one-year-olds. There may have been one or two tree-year-olds in them, and after they were unloaded we pulled the balance of the twenty-one cars down and started unloading them. This was sometime after midnight. As regards the first eleven cats, they were unloaded from the time the unloading was begun about seven-thirty until twelve o'clock, or around about that time, I would not say for sure just what time because the yearlings were easier to unload than the three-year-olds. As regards those first eleven cars of yearlings, when the cars were unloaded there were not any down and there were not any dead in the first eleven cars. I have a list of the cars here. We started with N. P. Car No. 913113.

Q. Instead of reading that into the record, have you that list here?

A. Yes. The list starts here, until right down to here (indicating).

This is the entire check right here.

[fol. 156] (Two sheets of paper referred to by witness marked Defendant's Exhibits 14 and 15.)

With reference to Defendant's Exhibits 14 and 15, those exhibits show, beginning with 14, the first eleven cars unloaded and then the balance unloaded. Exhibit 15 would be attached to the bottom of 14.

Mr. Veazey: We will offer these in evidence—15 is the second page continuing 14.

Mr. Enterline: May I ask this witness a question or two, Your Honor?

By the Court: Very well.

Examination by Mr. Enterline:

This exhibit is in typewriting. I did not have my typewriter with me when I made this memorandum at the time. I got this memorandum off of a field book that I happened to have. I do not know where the field book is at this time, but that was re-written from the original copy that I had, which I do not think very many people could read because we did not have only a few minutes to put it down. That exhibit was prepared on the morning of July twenty-third, 1917, in a freight office of the Great Northern Railway Company at Great Falls. I prepared it. I did this writing myself from my original book. I say that nobody else could read my writing. I could read it myself. I do not know where my field book is because I have left the Great Northern since that time and I do not know what has been done with it since. I did not make any search for it. I have kept this in my possession ever since. I had that in my posession and the field book may still be in my possession, but that would be in Sioux City, Iowa, but I am quite sure that has either been destroyed or is some place with the Great Northern. I would not be sure.

Mr. Enterline: We won't object to it.

Examination continued by Mr. Veazey:

This typewritten notice is absolutely a correct copy of what my field notes show.

Mr. Veazey: We offer this in evidence.

Mr. Enterline: No objection.

Mr. Veazey: I have made a mistake in tearing this off; there is another car at the top. That makes a total of twenty-one cars, or five hundred and forty-nine head of three-year-olds and seven head of yearlings, eighty-six down and nine dead.

[fol. 157] EVIDENCE: DEFENDANT'S EXHIBIT 14

	?	Total	40	head	1	yr.	old	None down	None dead.
Q	64647	"	40	"	1		"	"	"
Q—	68399	"	40	"	1		"	"	"
UP	40372	"	40	"	1		"	"	"
Q	62458	"	40	"	1		"	"	"
Q	67981	"	40	"	1		"	"	"
Q	62939	"	40	"	1		"	"	"
Q	63094	"	35	"	1		"	"	"
Q	65445	"	36	"	1		"	"	"
Q	62620	"	39	"38	1		"		
				1	3		"	"	"
Q	62538	"	38	"37	1		"		
				1	3		"	"	"

Total—11 cars 426 head of 1 yr. old and two 3 yr. old. None dead. None down.

Q— 62344	Total	26	head	3	yr.	old	2	down	1	dead.
Q— 69060	"	26	"	3		"	1	"	0	"
Q— 61841	"	27	"26	3		"				
			1	1		"	3	"	0	"
Q— 69082	"	28	"27	3		"				
			1	1		"	8	"	0	"
Q— 64939	"	26	"	3		"	4	"	0	"
Q— 64673	"	26	"25	3		"				
			1	1		"	6	"	0	"
Q— 62878	"	26	"	3		"	3	"	0	"
Q— 60883	"	28	"	3		"	4	"	4	"
SWST—8016	"	26	"	3		"	5	"	0	"
Q— 67377	"	27	"26	3		"				
			1	1		"	3	"	0	"
Q— 65722	"	28	"27	3		"				
			1	1		"	7	"	1	"
StLST—46905	"	26	"	3		"	5	"	1	"
Q— 65387	"	26	"	3		"	5	"	0	"
Q— 60703	"	26	"	3		"	5	"	0	"
		(372)								

(Number of first car listed torn off by counsel from Exhibit 14.)

Q— 65398	Total	27	head	26	3	yrs. old				
				1	1		7	down	0	dead.
Q— 63206	"	26	"		3	"				
Q— 69126	"	27	"	23	3	"	4	"	1	"
				1	1	"	6	"	0	"
UP—35798	"	26	"		3	"	4	"	1	"
AT&SF-55770	"	25	"		3	"	4	"	0	"
Q— 67776	"	26	"		3	"	0	"	0	"
Q— 61598	"	27	"		3	"	0	"	0	"

Total—21 cars—549 head of 3 yr. old and 7 head of 1 yr. old 86 down and 9 dead.

[fol. 158] There was no brutality indulged in in the unloading of those animals. As to whether we used any sticks to beat the animals over the heads with, we could not get close enough to their heads to beat them; we used these sticks to poke them and head them to the door to get them out of there. We did not poke them inside of the cars; we could not get in the cars; we poked them from the outside. We could not get inside the cars in the first place because they were too wild, they could not see anything and it was just a matter of taking your life in your hands to get in there. We used fuses for lights and also lanterns.

The troughs were in good condition. We had I think a small shipment of cattle there the morning of the seventeenth and after we reloaded I personally inspected the troughs and they were in perfectly good shape outside of a little hay that might have been in the bottom of the troughs, and that was cleaned before the shipment got in. They were not leaking. The only leaking that may have been done was the over-running of the troughs. Water was supplied to the troughs through two water cars. We had one water car on one end of the yards, of the stockyards, and one at the other end. I canot say how far outside of the city limits the yards are located. A city official, Mr. Shea, I do not know what position he holds, was over at one time objecting to the smell, wanted us to bury them. There was no connection between the yards and the city. This method of using tanks to provide water was not a special method provided for that occasion, but was the regular way that they were supplied with water. I had something to do with the reloading. As nearly as I can remember we began reloading at seven P. M. the twenty-second of July and finished at eleven o'clock. We had a very few railroad men at the time of reloading. The General Agent was counting one car from one shute and I was counting from the other car at the top, and we had a few section men there to lay down the planks, or the boards as you might call them. Whenever the cars were respotted and they would put in the bull boards and close the doors. Occasionally they would use a small stick or something, get in the chute there and prod them along, hurry them along a little, but most of that was taken care of by the company men. I believe that five cow men were taking part in the reloading.

As regards the unloading in the first place, the condition of the yearlings, or you might say the first eleven cars that we took off of the straight leg of the wye was good, from what I could see. There were none of them dead or there weren't any of them down. Some of them were down of course but they got up when the rest of them went out, and we had no trouble whatever in unloading them, but when we started on the balance of the cars we had more trouble. I could not recall the car numbers and do not know just what cars they were, but in some cases there were two down right in front of the door and we would open the door and leave the bullboard in and snake those out and get them in the clear, and after that tried to turn them around and get them started, but they didn't act like some other shipments that we had had in there that the cattle would follow [fol. 159] one or the other one down. One of them would go down or be pushed down and the others would remain in the car. As regards watering them, we left those down in the cars, we did not take any special time in getting those up, and we wanted to get those up that were still able to walk, and we left those in the cars and watered them by means of a bucket, and it seems that they could not get enough water at the time. They would lick the bottom of the floor, and the others that were left out ran to the water and drank and were later pushed away by those that came from the cars. I would not say how much water they got, but during the night they were watered and fed. Later there came a time when I separated those that were sick from those that were able to graze. I could not say how many were dead or held in the yards as sick, but I think there were something like close to one hundred and fifty that we kept in the yards. There were some of them down in the corrals and we had to get the others away so we could get the veterinarians to them. The balance stayed in the yards the eighteenth until the afternoon I believe of the nineteenth, something around two o'clock, and afterwards they were taken away and grazed somewhere. We got instructions to turn the cattle over to the man in charge and I think it was about two o'clock in the afternoon that they were taken by him. During the course of the unloading I did not see Wright until it must have been about ten o'clock. He may have been there but I did not see him. I did not see the man in charge, did not know who he was. I saw him standing there along about ten o'clock and I was informed by the Special Agent's department that he was the man in charge. After that he did not give us any instructions or anybody else. He was in there helping just like anybody else, doing the best we could to get them out of there. That is about as far as anybody could go. As to whether he said anything about having had experience at all, I did not ask him any questions at all. I asked him if he sent a wire to the man that owned the cattle and he said yes. Of the animals that were kept, of the sick animals, and separated from the herd that were grazed, I could not say as to how many of them survived. I know there was one hundred and forty-two dead all told, and there was seven I think—there were two died while they were out on the range, they were grazing west of the Falls there. I think those seven did not die after reloading; they died shortly after they were taken out; they checked short when they came in; there were seven too weak to be loaded and were held back.

Q. Then, out of that entire herd there were one hundred and fifty which were unloaded which were either dead or were retained as sick, and substantially none of those recovered?

A. Well, I don't know what happened to those seven head that were left there, because I left Great Falls shortly after that. There was one hundred and forty-two that died.

Of the one hundred and forty-two that died, they were mostly all three-year-olds. There may have been five or six yearlings as close as I can recall.

[fol. 160] Cross-examination of Mr. Krueger by Mr. Enterline:

Those cattle that were driven away from the others showed the effects of the condition, that is they were not in good first-class condition or in the ordinary condition of traveling.

Q. The whole shipment was affected, only those that died were more so?

A. They seemed as though they were weak.

That is the whole shipment appeared that way.

Q. What was the character of men that you had under you, Mr. Krueger, what nationality of men, Greeks?

A. Well now, there was, we had an assistant road master there part of the time and the train crew, all Americans. I do not know what the nationality of the balance of them were; they were section men, mostly Greeks.

—. When you went to work that night were the Greeks assisting in unloading, and did they afterwards assist in reloading?

A. The Greeks were unloading, that is assisting. As far as the unloading was concerned, that was attended to by myself and Mr. Hankins. They also closed the door when we reloaded.

Redirect examination of Mr. Krueger by Mr. Veazey:

I am no cattle man, but when the cattle were reloaded they acted just like any other first-class shipment that we handled out of there.

Mr. Foster, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey, testified as follows:

I am dispatcher for the Great Northern Railway Company. I was such dispatcher on July seventeenth and July sixteenth 1917. My hours of work were from four P. M. until midnight. As I remember that must have been true for the whole month of July. I was dispatcher on duty while this freight train involved in this case was moving from Armington to Great Falls only. I was dispatcher on duty at the time it was received from the Burlington. Calling attention to train sheets for July sixteenth, those train sheets are made up in the handwriting of the various dispatchers that are on duty at the time. As each train moves by a certain point the dispatcher on duty writes in the facts regarding that train at the time, from the facts furnished by operators along the line and train cr*a*ws. If a train sheet shows that a train is at a certain point at a particular time—the railroad is operated at that particular time at that point in accordance with the information set down. In reference to these train sheets, according to our train sheet the train in question left Billings at two forty-five A. M. and arrived at Mossmain at three-forty. On the train sheet is marked the words "Great Northern Junction." There is no difference between Great Northern Junction and Mossmain; it was called Great Northern Junction at the time [fol. 161] these train sheets were printed. The train left Mossmain at five A. M. It got to Judith Gap at nine forty-five A. M. For a stock train that is an excellent run. As compared to passenger train time, it nearly makes our passenger schedule of the present time. The run from Judith Gap to Great Falls was an average run. The train left Judith Gap at ten-twenty; it arrived in Great Falls at six P. M.

Q. Will you explain the delays that occurred in the movement of that train from the time it left Judith Gap, and what they were due to?

A. Well, according to the train——

Mr. Enterline: We object to that unless it is from his own personal knowledge.

I gathered that from an interpretation of the train sheet. I am able by looking at the train sheet to determine what it is that delays a particular train. The train left Judith Gap at ten-twenty; arrived at Hobson at eleven-seventeen and departed at eleven twenty-one, water stop. Arrived at Benchland twelve-one; departed twelve-thirty, meeting passenger train number two forty-two. Arrived at Stanford at one-five and departed at one-thirty, coal and water stop. Arrived at Geyser two-eight, departed two-fifty. The trouble at Geyser was for number forty-four, another passenger train. Arrived at Armington at three-forty P. M. and departed at four forty-five. This train when it arrived at Armington, there was two other trains at Armington at the time, or within a few minutes after it arrived there, and there wasn't side-track room enough for all three trains so the stock train backed up the Neihart line to make room for the other trains, to let the passenger train numbered two hundred and thirty-eight arrive without being delayed, and arrived at Great Falls at six P. M.

Considering next the question of the notice given by the Burlington to the Great Northern, I am familiar with the notice given by the Burlington as regards when the delivery would be made.

Q. State what that is and how you come to know of it?

A. The Burlington advises both the yard master at Laurel, if the shipment is coming over the Casper division——

Mr. Enterline: Wait a minute. Is that on your list there?
A. It is not on the sheet, no sir.
Mr. Enterline: We object to that as hearsay, and incompetent. I thought he was testifying from his train sheet.

We received advices in Great Falls ourselves finally as to when the Burlington will deliver a train from our Chief Dispatcher. He instructs me what to do.
Q. Now, what advices were received and what instructions were you given?

[fol. 162] Mr. Enterline: Now, we object to that, if it was a wire or telegram it would be the best evidence; if it was a telephone conversation that would be different.
Mr. Veazey: This is part of the operation.
By the Court: Overruled.

A. We had instructions that a stock train loading at Cody would arrive at Mossmain at four P. M. on the sixteenth, and had an engine lined up for this stock train.
That engine was No. 3034. In the end that engine was not used for a stock train, because we later received advice from the Burlington that the stock would not reach Mossmain until ten P. M. of the sixteenth and we had time freight in the Billings yards to be moved. Time freight is freight coming from connecting lines that are perishable or otherwise. We thereupon used engine No. 3034 to move this time freight, leaving Billings according to the train sheet at ten-forty A. M. I wish to correct my testimony in that I gave the wrong number of the engine before. It should have been 3027 instead of 3034. The freight in train in question left Billings at three P. M. on the sixteenth. That train crew was called for two P. M. and that train arrived at Mossmain at five thirty-five P. M. I came on duty on the sixteenth at four o'clock P. M. I expected to handle this stock until twelve at midnight. As regards making arrangements then for this stock train, we had engine No. 3057 going east from the Gap at that time with a time freight and we expected to use this engine for the stock movement. Engine No. 3057 got into Billings east-bound at three-fifteen P. M. That engine was being used for the same class of freight at the time that we used the other engine for out westbound, a time freight or through freight. That engine arrived at Billings at three-fifteen. The crew tied up at three forty-five; that would not be the engine men, it would be the train crew. They would then be available after eight hours' rest on account of the Federal law requiring crews to rest eight hours before being called. A message was then sent to Billings somewhere around seven P. M. to call engine 3057 and crew to go caboose-hop to Mossmain and get a train of cattle for the west. I believe the power was ordered for nine forty-five on this order. What then occurred should show on the train sheet of the Seventeenth. We could not then get this

engine on account of the crew's rest until twelve-thirty A. M., at which time it was ordered and crew is called for twelve-thirty. Then according to the train sheet the engine was derailed on the turntable and re-railed at about one-thirty-five A. M. It shows a delay of one hour and forty minutes for the engine, thirty minutes switching out caboose. The engine finally departed from Billings at two forty-five A. M. There were no other trains moved out of Billings between the time that the fast freight that was intended to be used for the stock train left and the time that the stock train in question left Billings. This stock train was given the first available crew and engine out of Billings after it had missed the connection arranged. I have the distance from Mossmain to Judith Gap. Our train sheet shows that it is one hundred and two and seven-tenths miles. The [fol. 163] stock train left Mossmain at five A. M., arrived at Judith Gap at nine forty-five A. M., four hours and forty-five minutes later.

Mr. Veazey: By the way, during the adjournment, if I might call the Court's attention to the fact, we entered into a stipulation that I would like to have entered now, that the actual distance between Cody and Mossmain was one hundred and two and one-tenth miles. May that be entered of record now?

Mr. Enterline: If that is the correct distance, yes. If it is wrong I will call your attention to it.

This distance of one hundred and two and seven-tenths miles was made in four hours and forty-five minutes by the Great Northern. The mileage from Judith Gap to Great Falls is one hundred and twenty and eight-tenths miles. That distance was made in seven hours forty minutes, leaving Judith Gap at ten twenty A. M. and arriving at Great Falls at six P. M. I believe the average speed from Mossmain to Great Falls is something like seventeen miles per hour or a little better. I have here an order book which shows the orders put out for this train and all orders that it met in the course of transit.

Mr. Veazey (to Mr. Enterline): These orders are avilable to you if you dispute them.

Those orders are orders that the actual dispatcher on duty put forth.

Cross-examination of Mr. Foster by Mr. Enterline:

When I testified that I had received advices about the shipment from Cody I had been advised theretofore that our road was to handle it from Mossmain. That is the reason that I was receiving advices from the Burlington road, to be in readiness so that the train might go on promptly and without delay. I first had information that it was to be there at four o'clock P. M. of the sixteenth.

We have no advice on the train sheet showing how soon afterwards it was that we received advice that it would not arrive until later. I spoke of receiving advice, and I am testifying as to that from recollection. We have no dispatcher in Billings. That advice comes from the Chief Dispatcher or Superintendent. I cannot say as to what time we would be advised from the Burlington Chief Dispatcher, or any other source, that the Burlington train would not be in until four o'clock. I have nothing on the train sheet to show that. I have nothing to show the time we were advised that it would be in at eleven o'clock, or the time it actually did arrive.

Q. When did you begin to make preparations to take this train on, and when did you expect, either from your train sheet or independent recollection, to start out from Mossmain after you were advised that the train would be late and would not be in until four o'clock; when did you next make any effort to be ready to take that train on?

A. I will have to explain. We usually get advice from a conductor [fol. 164] or someone when they get near a junction point that the train will arrive at this junction point at a certain time.

As to where and how we would get information that the train would not arrive until four o'clock, the Chief Dispatcher or Superintendent of adjoining division or road would wire the Superintendent or Chief Dispatcher of the Great Northern the probable arriving time. I remember having a note from the Chief Dispatcher that the stock would not arrive at the time previously reported.

Q. What I am trying to find out, Mr. Foster, is if you have any recollection or record as to the fact that it would arrive at Mossmain from the Burlington, and when you began to make preparations then to carry the train on, if you did?

A. I gave instructions through the operator at our office in Billings somewhere around seven o'clock.

I gave those instructions to prepare the engine at nine-forty or thereabout and call the crew. The engine which I had prepared for this stock train had not gone out with some other train. That engine which went out with some other train had gone out the previous day.

Q. Well, how many engines did you have available to carry on this stock train along that evening?

A. At what point?

Q. From Mossmain towards Great Falls.

A. At what point did we have the engines?

We had two engines at Billings that would be taken to that train for the purpose of pulling it or hauling it to Great Falls.

Q. Available from four o'clock on until the train did go?

A. Well, available, that covers quite a lot of territory when you are talking about an engine. We had two engines at Billings. I can't say exactly without looking at the train sheet when the second engine came in, but it was behind the engine that we sent out, that is it came in later.

As to when I finally made up my mind to move the train after it did arrive, and what action I first took in the way of having that train moved; as I stated, we ordered this power, but we cannot get the power until the roundhouse says the engine is to go. I ordered the power somewhere around seven o'clock P. M. to be ready at nine forty-five. That did not fall down because the train did not arrive, that fell down simply because the crew's rest was not up. At seven o'clock the order was in and it would operate just as soon as the crew's rest was up, and that was up at twelve-thirty, and then they were supposed immediately to start out at twelve-thirty. The train sheet shows that it was somewhere around one o'clock of the engine being off the track. An hour and forty minutes was charged up against the engine for that. If the crew was called for twelve-thirty, that would make it almost two o'clock when the engine was ready. I do not remember making any statement in my testimony that the engine was ready at one thirty-five. I would say that the engine must have been ready somewhere around one forty-five to two o'clock, and that engine arrived at Mossmain, according to my train sheet, at three-forty. That makes five minutes less than an hour to run [fol. 165] the distance to Mossmain, which is something like eleven and a few tenths miles. All it took was the caboose and engine, but you must remember that that was handled by Northern Pacific dispatchers, not by Great Falls dispatcher. We do not control our own trains over the Northern Pacific. I had nothing whatever to do with that. As to when I took charge to handle this train, the facts is I did not handle this train at all out of Mossmain, but the records show that I put out the orders for the train before I left. I have the orders which I put out here in the book if you wish to see it. I came off duty at twelve o'clock.

Q. I want to know what order you put out for the movement of the train?

A. The way it read? The number——

Q. I don't care about your number, but just what order you gave for the movement of that train.

A. Well, there is quite a little bit to this order. This engine had an order reading that they had a right of track.

Q. That is what I want to find out; will you kindly read that into the record now, the order that you made.

A. You mean just the way the body of the order reads, is that what you wish?

The order reads, beginning at the period, that is after the address to whom it is to be given, as follows: "Engines 3057 and 3034 run as two stock extras leaving Mossmain on Tuesday, July seventeenth as follows, with right over all except first-class trains. Leave Mossmain twelve-thirty A. M." The rest of it is the different time at the stations along the route. This stock train was given the right-of-way over everything except the passenger train. This order reads that it was to move at twelve-thirty A. M. Train sheet shows that the engine arrived there at Mossmain at three-forty and it left at five o'clock. That order which I got out would be supposed to be carried out by the man who succeeded me. As to the delay of the train at the station called Armington, near Belt, this train had the same order, that is with a different engine, practically as this, reading right over all excepting first-class trains. There was one train ahead of this stock train that got in ahead of them, but they could not get in the clear, that is they could not get in on the sidetrack in time to save the stock train a few minutes' delay, and by the time the other trains got squared around the different trains that were in there at that time the stock train did not have sufficient time to get it for the passenger train number two hundred and thirty-eight. stated that would only make a difference of a few minutes, but in e long run of course it amounted to an hour. In the long run it nounted to an hour delay altogether. I would not say that it was n unusual time for it to take over an hour before moving on. We ften have occurrences of that kind.

Redirect examination of Mr. Foster by Mr. Veazey:

I have been trying to get the original files showing the orders and otices received from the Burlington here that night. They are sup-
fol. 166] posed to be in at the hour of four o'clock on number four, at is when I am expecting them.

(12-14-20.)

Since last evening I have secured the original report from the urlington. Defendant's Exhibit 16 which you show me covers the essages showing the advice from the Burlington and the arrangeents made to handle the stock. That was what I referred to yesrday.

Mr. Veazey: We offer these in evidence.

(Defendant's Exhibit 16.)

Mr. Enterline: We have no objection, but what is the purpose of ese others, to explain that testimony about the others that went it first? The Browning shipments are not in controversy here.

Mr. Veazey: Our first advices were that this stock was to go to rowning. There is no agent at Seville and Browning would be the rst agency station.

By the Court: Let the record show they are received without jection.

Defendant's Exhibit 16

Telegram

Great Northern Railway Company

BG AN F None.

Casper, July 14, 1917.

. E. Votaw, Gt. Falls:

Will deliver you Mossmain July 16th 35 cars Browning cattle aded at Cody about noon 16th exact figure later.

N. C. A. 4.30 p. m.

Telegram

Great Northern Railway Company

BG GW 6p.

Casper, 15.

G. E. V., Great Falls:

Later will now load Browning cattle at Cody tomorrow will deliver Mossmain about 4 P. M. tomorrow joint all.

N. C. A. 7.20 P.

Telegram

Great Northern Railway Company

Gt. Falls, 7, 16th, 1917.

A. C. H. & Disprs:

Want the stock train coming from Cody tonight to have a strictly first class stock train run, if possible making 20 miles per hr. in- [fol. 167] cluding all delays, shippers extremely anxious that stock go thru to Seville without unloading. Do not add any dead frt. to this train.

J. W. H.

Telegram

Great Northern Railway Company

BG R OA 4p.

Casper, July 16.

G. E. Votaw:

Extra 965 Mossmain about 10 p. m. has 32 cars cattle for Galbreath Cattle Co. Seville Mont. via Mossmain loaded Cody 355 p. m. date release si-ned.

M. E. C. 7.20 p.

Telegram

Great Northern Railway Company

Casper, July 16th, 17.

G. E. Vt.:

Browning Stock Still Loadg at Cody Now reach Mossmain abt 10 pm.

M. E. C. 10.5 p. m.

Mr. Votaugh was the Superintendent of the Great Northern at that time. N. C. A. are the initials of the Chief Dispatcher or the Superintendent, I cannot tell which. The 4:30 P. M. means the receiving time of the message. The telegram refers to Browning cattle loaded at Cody about noon the sixteenth. Those cattle refer to the cattle going to Seville. The chances are the stock would be billed to Browning and I would refer to it as the Browning stock. That was on account of there being no agent at Seville. "Casper 15 G. E. V. Great Falls Later will now load Browning cattle at Cody tomorrow will deliver Mossmain about 4 P. M. tomorrow joint all N. C. A. 7:20 P." That would mean that at seven-twenty P. M. I received a message from either the Superintendent or Chief Dispatcher N. C. A. of the Burlington that the Browning cattle would be loaded at Cody tomorrow, that they would be loaded on the sixteenth and would be delivered at Mossmain about four P. M. the sixteenth.

"Great Falls 7 16th 1917 ACH & Disprs Want the stock train coming from Cody tonight to have a strictly first class stock train run, if possible making 20 miles per hr including all delays, shippers extremely anxious that stock go thru to Seville without unloading. Do not add any dead frt to this train. J. W. H." A. C. H. stands for the initials of the night Chief at that time, it is signed by J. W. H. who was Chief Dispatcher at that time, Mr. Hyndman, who is [fol. 168] now "BG R OA 4 p Casper July 16 G. E. Votaw Extra 965 Mossmain about 10 p. m. has 32 car cattle for Galbraeth Cattle Co. Seville Mont via Mossmain loaded Cody 355 p. m. date release signed. M. E. C. 720p." M. E. C. 7:20 P. indicates that the message was filed at Casper at four P. M. and received at Great Falls at seven-twenty P. M.

"Casper July 16th 17 G E Vt Browning stock still loadg at Cody now reach Mossmain abt 10 p. m. M E C 105 p. m." 1:05 P. M. means that at one-five P. M. on the sixteenth we received advices that they were still loading the stock at Cody and would not reach Mossmain until ten P. M. These messages all relate to the shipment in question.

Cross-examination of Mr. Foster by Mr. Enterline:

This telegram which is addressed ACH and Dispatchers signed by J. W. H. in which he advises all the dispatchers to run this train through is sent by J. W. Hyndman. Mr. Hyndman is the Chief Ditspatcher. He was above me.

Q. Do you know what hour this wire was sent to the other dispatchers to rush this train through?

A. That message was laid on our desk.

I had it on my desk before I went off at twelve o'clock that night. Whoever succeeded me was confronted with that direction to get that stock train through

Redirect examination of Mr. Foster by Mr. Veazey:

There is a Chief Dispatcher and then in addition to that there are three trick dispatchers usually for each division of the railroad, working eight hour shifts. Then there is a night chief and a day chief supervising them. The object in putting out a schedule such as I referred to yesterday for a stock train is so that all trains may have this order, that are affected by it, and clear or take the siding for this scheduled train. It has the effect as if that train were put on the time card, and all trains will keep off of its time. If that train became late or we wanted to run another stock train back of it, this stock train will have a copy of the same schedule order of the train following it, and if the train were late an order would be put out running it so many hours or minutes late on this schedule.

MELVILLE F. BROWN, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is Melville F. Brown. I reside at Cutbank. I recall seeing the bunch of Pitchfork cattle arrive on the reservation in the year 1917. I was not present at the unloading. I saw them first some few days after they were unloaded. I saw them on the Galbraeth Cattle Company lease. After that I had an opportunity to [fol. 169] see them in gathering cattle and riding the range. I first saw part of them next after this first time that I have spoken of a few days later; I was over to Mr. Thorpe's place. I did not have anything to do with them that fall. The next spring I helped dip the cattle and worked with them a little. That dipping was done in the early part of the summer. I saw them more in the year 1918. I saw them that fall. I happened to see them that fall because I was helping gather the beeves I guess, rounding them up. They were rounding them up for beeves, shipping beeves. I saw them after that, after some of them were shipped in 1918 at different times. I guess just ordinarily riding through as a person would gathering his own cattle. I saw some of them in 1919. I did not see any of them shipped in 1919; I was not present when they were shipping in 1919. When I first saw them shortly after they were unloaded they looked like a pretty good string of cattle. When I saw them when they were dipped they were in pretty fair condition. When they were shipped, and when I was rounding them up for the purpose of shipment the Pitchfork cattle then looked like a mighty good string of cattle. When some of them were shipped in the fall of 1918 at that time I had a conversation with Mr. Thorpe as regards their condition. We talked about it just like a lot of cow-punchers would be, betting on them about the weight and one thing another just general conversation. Mr. Thorpe then placed an estimate on the weight of those cattle of about thirteen hundred.

Q. Did he say anything that he was going to do then about what price he would get on the market?

Mr. Enterline: That is objected to, as the price at that time would be incompetent.

As to whether he boasted to me at that time that he would top the market with these cattle, he said he would like to, he wanted to try to, that is the cattle just in that vicinity, right there.

Cross-examination of Melville F. Brown by Mr. Enterline:

I am on friendly terms with Mr. Thorpe at the present time. He has not done anything to me that I should not be friendly with Mr. Thorpe. I claim that I am friendly with Russell Thorpe. I have never yet had any difficulty with him at all. I am extremely neighborly and on friendly terms with him, and always have been. I did not see the cattle when they were received at Seville; I saw them possibly a week or ten days afterwards when they were on the lease. When I say that they were in pretty fair condition I mean by that that they were good cattle.

Q. Do you mean to say that all those Pitchfork cattle were in such condition as the average condition of cattle, without showing that they had gone through any rough treatment, or any experience whereby they would become gaunt?

A. Well, they weren't gaunt at the time I saw them; they were pretty well filled up.

[fol. 170] I would say that they were in just as good condition as any other cattle that had not been injured in transportation. That is true of the cattle I saw there on the range of the Pitchfork cattle. I could not say how many head I saw, but I saw quite a bunch. I saw approximately all of them. That was within a week or ten days after they had been received at Seville. That one time I was around the cattle observing them I guess just riding through. I was riding through them looking for stock of my own. I guess we spent a day on the lease there riding through this drove. The next time when I saw them was some time later, along in the fall, the next time was in the fall when I was in there.

We were rounding them up then. At the time I saw those cattle there I think there was other cattle running with them of the Galbraeth Cattle Company. Those Pitchfork cattle were mixed in with a lot of other cattle. There were three C cattle and different brands. When this shipment was made, about which I have testified, along in the fall, there were not only Pitchfork cattle but other cattle belonging to the Galbraeth Cattle Company at that time. There were various brands. And then Thorpe said he would like to top the market if he could.

D. J. Cole, a witness called on behalf of the defendants, being first duly sworn, upon direct examination by Mr. Reynolds testified as follows:

I live at 403 Yellowstone Avenue, Billings. I am in the dry-goods business. I am occupying the official position in the Weather Department of the United States Government of United States Special Observer. I am stationed at Billings. I have occupied that position since 1911. In my position as observer it is my duty to take observations at this station at six A. M. and six P. M. I also take maximum and minimum temperatures for the day and night. I also take observations as to whether or not it is clear or cloudy. I also take observations as to whether or not a wind is blowing, and if a wind is blowing I show from what direction. I know where Mossmain is. I do not think that there is any substantial difference in the temperatures at Mossmain and Billings. In keeping my observation I use a regular set of government thermometers and barometers. We have two regular government sets, but we do not use the duplicate except in case of accident. A government set consists of what is called dry thermometers and maximum and minimum thermometers. The dry thermometer is a thermometer which registers the actual temperature at the time of the reading. The maximum reads the maximum temperature for the period since the previous reading. The minimum thermometer registers the minimum temperature for the period of twelve hours. The thermometers are read in twelve-hour periods, at six A. M. and at six P. M. At each reading at six A. M. and six P. M. they are set so that they all read alike, that is they all read the actual temperature at the time [fol. 171] of the setting as shown by the dry thermometer. The maximum will register the warmest temperature from the time it is set until it is reset, and the minimum will register the lowest temperature from the time it is set until it is reset. For instance, we take an observation at six A. M. the maximum theremometer will show the highest reading or the highest that it goes between six P M. and six A. M., or vice versa as the case may be, and the minimum will register the lowest temperature during that period and those thermometers will remain at the highest and lowest points until reset, which is done at each observation. Those instruments are always backed up by a different set, and they have to back up each other. We test each one at the time they are set because they always have to be set at the observation. We will say for instance that the maximum at the time of observation was seventy and the minimum and the actual temperature at the time of the observation was sixty, if they are all perfect, when they are reset they will all be sixty, and start over again you see. So they test themselves really at such observation. At each reading at six A. M. and six P. M. they are all set so that they all read alike, that is they all read the actual temperture at the time of setting, so that in case they are out of order you can set them so that you know that they are all backing up each other and reading the absolutely correct temperature because they prove each other. I would say that those instruments are as correct as it is possible to have them. I have with me the original record of the temperatures showing actual temperatures at six P. M. of July sixteen, 1917. I also have the original record of the temperature for six A. M. of July 17, 1917, also the maximum and minimum for the day and night both preceding and following. These records are right here. Those records are kept upon a sheet, each sheet covering one month.

Mr. Reynolds: May it please the Court, we would like to offer in evidence the records for July sixteenth and July seventeenth, 1917, with the privilege of not having it marked, it being an original government record, with the privilege of substituting a copy.

Mr. Enterline: No objection.

(Here clerk will insert exhibit offered.)

By turning to the record for July sixteen, 1917, the temperature at six P. M. I find was ninety-two. The temperature as shown by my record for six o'clock A. M. of July seventeen of the same year was fifty-eight. The minimum temperature as shown by my record between six P. M. of July sixteenth and six A. M. of July seventeenth, 1917 was fifty-two. There was a light wind blowing from the southwest during the period between six P. M. of the sixteenth and six A. M. of the seventeenth. From my experience as an observer I would say that the temperature commences to drop very soon after the sun goes down. Not rapidly at first but a little bit later in the evening it gets quite cool here as a rule. I would say it would be about ten o'clock perhaps before it commences to get quite cool; it varies of course on diffe:ent days. The tempera- [fol. 172] tuie reading at six A. M. of the sixteenth was fifty-seven. The temperature reading at six A. M. of the seventeenth was fifty-eight.

Cross-examination of D. J. Cole by Mr. Enterline:

These observations are taken here at Billings. I would not think there would be more than a degree or two one way or the other between the temperature here and at Mossmain.

Q. Doesn't the river here, which is closer to Billings, affect the temperature more at night more than where the river is farther away from a place?

Mr. Veazey: We object to that as not in keeping with the evidence, and not based upon the facts.

By the Court: There isn't any evidence as to the location of the river at either place. Overruled.

I know where the Yellowstone River is located here, and I know where Mossmain is. I do not know that the river is farther away at Mossmain that it is here at Billing; it possibly may be farther away, I do not know that the closer the river is to the point of observation would affect the temperature, I do not think it would in the valley.

Q. You think then at Billings, as an illustration, it is just as cool in the town of Billings as it would be right down at the river bank at night?

A. Right here in the streets you mean?

Q. Yes.

A. No, I don't think it would, the radiation from buildings would make a difference.

Q. Now then, again, Mr. Cole, on a railroad track it is always warmer than it is away from the track, isn't it? In other words, the steel rails during the day become heated?

A. Always seems hotter.

I do not know that the atmosphere in that vicinity cools off less quickly than it does away from the railroad track. I know it always seems hotter on the railroad track in the day all right, but I doubt if there would be very much difference in the night. I take my observations here at 403 Yellowstone Avenue, one mile west right straight up the valley. The observations are not taken on the top of a building, they are taken in an open space on the ground. There was a light wind that night from the southwest.

Redirect examination of D. J. Cole by Mr. Reynolds:

When I say on the ground I do not mean right in contact with the ground. I mean just four and one-half feet from the ground. The instruments are set in a cabinet four and one-half feet above the ground, made of slats so that the air can circulate freely through.

[fol. 173] L. A. NUTTING, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is L. A. Nutting, I reside in Great Falls. I am a veterinary surgeon.

Q. Will you state to the jury your experience and qualifications as a veterinary surgeon?

A. Well, I practiced it for five years—I am a graduate of Toronto. I graduated in the year 1896 and practiced for five years, and then took a post-graduate course at the New York Veterinary College, and then took the Civil Service and entered the Bureau of Animal Industry. I was with the Bureau of Animal Industry about nine or ten years, between nine and ten years. I began practicing for myself in September of 1909, and have been practicing ever since. I was called by the railway company to see a shipment of livestock that was in the yards at Great Falls on July eighteenth, 1917. I looked over the situation there. At that time I found cattle that were lying around, and they had not finished unloading some of the cars yet, and then there were some more of the cattle that were out to one side being herded. The cattle seemed to be lying down and if you would come near them they would charge you. They would rise in front and could not navigate behind very well. They were panting, but their tongues were not hanging out. They were breathing fast due to excitement and that like. There was no struggling for breath. I took the temperatures of some of the living animals. Those temperatures ran from one hundred and five I think to one hundred and ten. I afterwards performed an autopsy on some of the animals. I found the lungs normal. There was no congestion of the lungs whatever. The livers were all normal; the gall-bladder had some gall in and the kidneys were normal. The condition of the heart was normal. I did not notice anything about coagulation of the blood; I did not pay any attention to that at all. When we opened up the cavities the intestinal tract all seemed to be normal and there was not much food in the stomach. I did not open up the intestines. I was there when Dr. Nash made an autopsy. I do not believe the intestines were opened up at that time. As I remember, there was no sign of anything wrong with the kidneys at that time. We took and stripped those down and in my presence there was no bowel cut open at all. When you would approach the animals that were down they tried to get up and charge you. You could not get very near them because some of them did get up behind, but most of them would just shake their heads and come for you. There were some that were in a state of com*ma* just before death, just about as they were breathing their last, then that was all. Up to that time they were right on the prod all the time. Com*m*atose means that they are in a state of com*ma*; they do not notice their surroundings.

Q. Now, if you will, state what diagnosis you made and what you think was the cause of the death of the animals?

A. Well, of course it was hot and I thought it might be heat pros- [fol. 174] tration, but I sent a telegram to Buttler and I said "Cause of death is a question——

Mr. Enterline: Well now, wait a minute. What he sent to Buttler I move to strike that out as incompetent.

By the Court: Strike it out.

I was in doubt as to the cause of death. I did not investigate the matter further just then; later on we did. I thought this was heat prostration but was not positive. Heat stroke was what we had in mind. After studying the symptoms of heat stroke and the symptoms of other trouble I am not of the opinion that it was heat stroke; I now think it is bowel trouble. I based that opinion on the fact that in heat stroke you have congestion of the lungs, liver, kidneys and the blood on the right side of the heart is full, the heart is full of blood on the right side and there was no symptoms whatever of that, and then the animals—then there was just two of them I believe scoured and the others were constipated. You do not get your bowel trouble in heat stroke.

Cross-examination of L. A. Nutting by Mr. Enterline:

I changed my mind last May or March; I changed my mind in March of 1920.

Q. Up until March, 1920 you were of the opinion that the animals in question died of heat prostration?

A. I never gave it no thought afterwards, didn't come in my mind at all.

Q. Well, I didn't ask you that, I wanted to know when you changed your mind, which you told me was in May, was it 1920?

A. No sir, March.

From July, 1917, until March, 1920, I had not made any investigation which made me change my mind. I let it lay just the way it was; I let it ride until March, 1920. As to what occurred in March, 1920, to change my mind, several of we veterinarians were talking one day about different subjects—I think it was Dr. Knowles and some more of us, it was Dr. A. D. Knowles. I think Dr. Kesselring was also there. Nobody else was there that I know of. Dr. A. G. Knowles is not a Great Falls man; he is from Missoula. Myself and A. D. Knowles and Kesselring were talking over the matter.

That was in March, and from my talk then I was still in doubt as to a conclusion. I did not make up my mind positively at that time; I made up my mind positively that they died of bowel trouble when these animals were opened in my presence. I did not see the bowels, none of them ever opened a bowel, and in comparing your symptoms of enteritis and heat stroke, for heat stroke, we never got those symptoms that would produce heat stroke and therefore it must have been enteritis. That is my diagnosis now.

Q. Well now, just because the bowels weren't cut open, was that the reason that you came to the conclusion that it was enteritis?

A. Well, in comparing them with other cattle that had died under similar circumstances, sudden and many of them, that was brought [fol. 175] up for comparison, we concluded that that must have been the cause of the animals dying in this bunch. I now say that they died of enteritis.

They contracted that before they left Cody; it was caused by milling them around in that excessive heat and eating that salt and keeping them without water, eating salt sage and keeping them away from water. I do not know what the chemical composition of salt sage is, I am no chemist.

Q. Then how do you know that is what affected them?

A. Well, I know that in the testimony on your side it has proved it because they said on the——

Q. I am asking you of your own knowledge now Doctor. You say you do not know anything at all about the chemical composition of salt sage?

A. No sir.

I had not heard this testimony before I got here, and I changed my mind before I got here. I commenced before I ever got here.

Q. Now, let's commence at the period before you got into the court room. Now you know nothing at all about salt sage, now what else did you know anything about?

A. My attention was called in comparing your textbooks with the conditions of heat stroke. You could not verify it and we did not at those post-mortems, and the only thing we have to go by is our textbooks.

Q. You do not go by your experience at all?

A. In this case we go by our textbooks, yes sir.

I am going by our textbooks in this case and the experience of cutting open those cattle and trying to verify it with the textbooks. Other than the salt sage which I say the cattle ate before they got on the train another cause which I would attribute to enteritis would be that any woody substance or indigestible substance will cause enteritis, chilling, overfeeding, heating, there is probably a dozen more things will cause it.

Q. Well, what I want to know is what you base your diagnosis on other than the salt sage?

A. Well, as I say, I had to verify my postmortem notes with your textbook and your postmortem notes on your heat stroke do not compare, and by the cattle not getting up behind it certainly must have been bowel trouble. Your kidneys and liver were normal.

Externally the bowels appeared to be normal to me. I do not know that if there is any enteritis in an animal it will show externally in the bowels. It will not always show. You have to strip off that bowel and show it under a submucous membrane. I was called there as an expert for the railroad company. I did not cut open the bowel because I made the same postmortem as I would in the field. In my opinion, from all my investigation before hearing any testimony here, without taking into consideration my reading of textbooks, the cause of that enteritis may have been from eating a woody substance and that like, and lack of water will do it, aggravated by the heat.

[fol. 176] I attributed it to eating woody substances and lack of water after conferring with the textbooks. I am basing my opinion now upon the fact that the animals ate salt sage and lack of water and milling them around and excessive driving and the hot day. You remember that they had a fill of that salt sage The excessive driving upon which I predicated that opinion was what the witnesses said, that they hazed them.

Q. Leave the witness out of it. You came to a conclusion before you got here, Doctor, in March.

A. I had talked that over in March. I had not decided. I was not certain then.

I found out for certain that those animals died of enteritis after conferring with the textbooks and after we talked about it and conferring with our textbooks and conferring with our post-mortem notes there was not any heat stroke. I came to that conclusion before I came here to court.

Q. Then what excessive driving did you have before?

A. Your textbook says "driving and excessive heat and overwork." Now your overwork is your driving ain't it? I did not have any history before me in the way of excessive driving when I made my diagnosis on these cattle. I did not have any history on these cattle until I came here and heard your testimony on your side. I came to that conclusion however before I got here.

Q. Now, what milling around, what evidence did you have of that when you made your diagnosis?

A. Anybody that seen a roundup——

As to what history I had before me of a roundup when I made my diagnosis, when I took an interview of this young man that brought them he said that they drove them a good way, about forty miles, and fast, and he said they held them twenty hours without water.

Q. I will assume to you that it took them four days to drive those animals forty-one miles, driving on an average say ten miles a day.

A. That was the short end of it.

Q. What is that?

A. That is probably the short end of it; they probably drove from thirteen to fifteen.

They probably drove them from thirteen to fifteen miles each day. They would have to drive them from thirteen to fifteen miles each day to make the forty odd miles. If I would assume that they drove thirteen to fifteen miles a day to make forty-one miles in four days

I would say that that is an excessive drive in the middle of the day on a hot day, it is too much for cattle. I did not know that they rested all night. I have heard you say that they rested all night and every night on the road, and when they arrived at Cody the fourth day at about four o'clock they watered at splendid water up until seven o'clock.

Q. Well, you assume that, I want you to assume that Doctor.

A. Was it cold mountain streams?

[fol. 177] Q. Good water for cattle.

A. Was it cold mountain streams? Because I will tell you you can get that from chilling too, bowel trouble.

Q. Do you think that they got it from drinking water there at Cody?

A. If it was cold mountain streams you see they could get it right there.

Q. Did they get it from the water?

A. They could have got it from the water after filling up with sagebrush, filling up with cold water, yes sir they could.

Q. So then you think, Doctor, that they would begin to get the enteritis after eating the salt sage there at Cody and drinking the water?

A. Cold mountain water will produce it, yes sir.

You said that they drank water awhile ago. Assuming that they drank cold mountain water and that they then started to get the enteritis, enteritis will begin to show on the animals in a few hours, from twenty-four to thirty-six hours. It is evidenced from the time they started to go down there. Other symptoms would be that they would keep going down, and another symptom would be that on post-mortem we found those that were constipated.

Q. Just answer my question if you will, what symptoms would they have manifested if they had had enteritis there at Cody?

A. Enteritis shows upon getting down and getting up.

It would show in that manner from twenty-four to thirty-six hours.

Q. Well, those animals arrived at Mossmain at eleven-twenty with none of them down in the cars. I want you to assume that now Doctor.

A. Well, they were going down fast, your witness said so.

Q. Wait a minute. I assume to you Doctor that those animals arrived at Mossmain at eleven-twenty on the sixteenth, in order that you may understand, they arrived at the Cody Canal on the evening of the fifteenth about four o'clock and were permitted to water there up until seven, and fed there on salt sage.—I will put in that too. They were loaded the next day from along in the morning and driven about two miles to the station and then were cut out, rounded up and the yearlings cut out of the three-year-olds, and were placed on the cars on the tracks. They arrived at Mossmain at eleven-twenty and in good condition, none of them down. Now, assuming that——

A. But they went down shortly afterwards,——

Q. Now wait a minute until I get through. Did they have enteritis then?

A. I believe they did.

Q. What symptoms had they shown from my question?

A. From your question they had not commenced to go down yet, but shortly after they did from some of your witnesses.

Q. We will get to that later. What symptoms did they have from the question that I put to you?

[fol. 178] A. They commenced to go down.

Q. They hadn't commenced to go down though from my question.

A. Yes, but——

Q. They hadn't got down Doctor during the time I have stated to you, they were in good condition, standing up in the cars after they arrived at Mossmain at eleven-twenty. Now then tell the jury what symptoms they had of enteritis.

A. Well it was a little previous before they would commence to show it.

Q. Well, didn't you say they would show it within a few hours?

Mr. Veazey: Now, if the Court please we object to that question, because this witness is not in position to state what symptoms they did show under the question put by counsel. He could testify as to what symptoms they might show under different conditions, but it is not fair to ask this witness as to what symptoms they did show when he doesn't give any symptoms upon which he can state.

By the Court: Overruled.

A. Yes sir, from a few hours to thirty-six hours. And I said to his question—"I will answer it is a little premature time to show it." I said that before but you wouldn't accept it.

That is premature. As long as they stood up in the cars I do not think that up to that time they did show any symptoms. The going down of the cattle in order to show enteritis is not necessarily the only symptom; they will be moving around uneasily, they will look tired, get down and get up, and then this fellow will come along again and punch them up and then eventually it will get aggravated as the time goes on and some of them will get down and some of them die.

Q. If there is anything else other than being restless or going down as a symptom of enteritis I want you to tell it.

A. Your symptoms have—All I can go by is your post-mortem. In addition to the symptoms of restlessness and lying down, in enteritis you will have scouring, constipation and straining, sometimes tympany. Tympany is bloating. I have mentioned all of the principal symptoms.

Q. I want you to mention all.

A. Well there is ten thousand things probably.

Q. Tell them.

A. Well, I think you will have to give that job to somebody else.

Q. Then you are at the end of your knowledge are you?

A. I have given you the principal ones.

Q. Well, give me the rest of them.

A. Well, I can't give you only the principal ones, and I have given you the principal ones.

Q. Well, I am asking you what the others are now. What I want to know Doctor is if you have told us all you know about the symptoms, all the symptoms that you know?

A. I have told the principal ones.

[fol. 179] Again, they would not chew their cuds, they would probably have dry muzzles.

Q. All right, that is another one now, now I want you, if there is any others, if there are any others I want you to tell it?

A. I guess that will stand.

There is not always blood passing in cases of enteritis. There was not in this case.

Q. Isn't it when it becomese chronic?

A. Oh well, this wasn't chronic.

This was not chronic, it was acute, that is what this was. I would call it acute gastro-enteritis when you have bloating. There was a few of these animals that bloated slightly.

With reference to the question of the membrane of the bowels, I recognize the Department of agriculture's special report of the diseases of cattle for the year 1909, eleven years ago, as general authority.

Q. I will read from that and see whether you agree with it, Doctor

Mr. Veazey: Show him the book if you will, let him see the passage you are reading.

Mr. Enterline: All right, if you mistrust me, I will let the Doctor read it.

A. You better read it, my eye-sight is poor.

Q. No, Doctor, I would not mistrust you at all.

A. I would not you either.

The passage in the book to which you refer reads as follows: "Gastro-enteritis. The mucous membrane of the fourth stomach has a well marked red color and sometimes presents ulceration. The wall is thickened and softened and similar conditions are found in the walls of the intestines. The red discoloration extends in spots or large areas quite through the wall, showing on the outside." That reading of the textbook is correct, but that is a condition after it has run for some time. As I said, you won't get that in acute enteritis, you will get that later on after it runs from about a week and from that on. We are only talking about acute enteritis here. After it runs awhile you don't have to open the bowels, you can see it on the external part of the bowel and it will be a dark purple. When I saw the cattle it had run from the time they had left Cody; it was commencing then.

Q. At what point after they left Cody?

A. The first the caretaker knew when they got down and they could not get up.

Q. Well then, you would limit it, would you, or would you say it began to show evidences of that within a few hours after they arrived at Mossmain and the cattle began to go down?

A. Well, he said——

Q. Well, I am assuming to you now Doctor——

A. Anywhere within a few hours to thirty-six hours it commences to show, yes, sir.

—. Do you think it commenced the night they were drinking water?

[fol. 180] A. I think it aggravated the cause.

It would have to start then before it was aggravated. You said that they filled up with mountain water. I am taking your word for that. The witnesses said that they over-loaded the cattle. I attribute over-loading as another cause.

Q. Do you know anyhing about loading cattle, how many go in a car?

A. Well, I done this field work, inspected for I guess about nine years along the road.

I would say that twenty-six three-year-olds in a car is too many. I would say that they began to get their bowel trouble after they were loaded, that is they didn't notice it until after they were loaded.

Q. Do you think that was one of the contributing causes, or the cause?

A. It aggravated it, it didn't help it any.

The hot weather has something to do with it, and lack of ventilation in over-loaded cars, stuffy atmosphere.

Q. Do you think when they stopped at Armington for over an hour that improved their condition or made it worse?

A. Well, I happen to know Armington. It is a dandy place to stop for trains.

Q. Let us assume it was hot there and not so dandy; and they were kept there for an hour or more without any air stirring——

A. There is always a breeze there because I have been there hundreds of times.

Q. Well, forget it.

A. I can't do that.

Q. Assuming that a train was there at a cutbank there in the hot sun and there was no air blowing at this particular time——

A. Well, I have been there on that branch.

By the Court: Wait a minute now.

Q. At that particular time Doctor it was hot and no air was stirring. Now then, would that aid in the condition of the cattle, or wouldn't it be liable to make them suffer with the heat?

A. Well, if the cars weren't over-loaded it would not hurt them a bit.

According to my opinion as long as the cars were not overloaded they could stand in the hot sun without the train moving at all and it would not hurt them a bit.

Q. Then you attribute it, then, that if they began to go down there—if they did more than they had up to that point, that that was simply on account of their being over-loaded?

A. The cattle were all affected before they left this end of the line.

Q. I wish you would try to answer my questions a little better than you do.

A. Well, give me the question.

Q. Read it to him.

(Question read.)

[fol. 181] A. Well, the enteritis was affecting them more the longer they were in transit.

Q. Now Doctor, do you remember about two months ago you being in the Rainbow Hotel at Great Falls, you and Dr. A. D. Knowles, and Dr. Kesselring?

A. I have been in there a good many times, I do not remember just the dates.

Q. Do you remember then having a conference or a talk about the condition of these cattle and the diagnoses that were made and what caused their death?

A. I do not know any particulars of that date.

Q. Do you remember Dr. A. D. Knowles reading a statement that had been prepared, and which you were trying to get Dr. Kesselring to sign?

A. I do not remember that Dr. Kesselring was asked to sign it.

After reading over plaintiff's Exhibit O-P for the purpose of seeing if I can refresh my recollection that the original was read by Dr. Knowles in my presence and in the presence of Kesselring and in the presence of Dr. Mitchell another veterinarian, I would say that I remember of it being read, but I do not remember of those fellows being present. I remember of that report being read. After it was read at the time stated I do not remember whether Kesselring first said "I cannot agree with that."

Q. Didn't you ask Kesselring on the way down here a few days ago on the train, you and he being on the train together, didn't you ask Kesselring and say to him "You had better sign that report," referring to the original of this report?

A. I don't think that there was a report mentioned on the train coming down here.

I will say that I did not say anything to him coming down here.

Q. Didn't he say "What report" and didn't you remain silent then?

A. I do not remember of ever saying a word about a report coming down here.

Going back again to the Rainbow Hotel after this report was read, the original of which has been marked as plaintiffs' Exhibit O-P, I do not remember that I said in substance, after Kesselring had remarked that he could not agree with it, "What am I to do or say," or "How can I get out on an examination, as I already said it was heat prostration that killed the cattle." I do not know as Knowles then replied "You can after reading in textbooks, easily change your mind or change your decision." I do not remember that he did.

Q. Both you and Knowles have been endeavoring to get Kesselring to sign that report?

A. I never approached Kesselring on that report.

I do not know whether *were we* all to sign that report. I know I signed it. You said that Dr. Knowles prepared that original report.

[fol. 182] Q. Well, I said he read it, I don't know who prepared it.

A. Well, I don't know who prepared it.

I signed it and Knowles signed it. I do not know whether Knowles signed it or not, but I signed it. Up to that time on June seventeen, 1290, I was of the opinion that it was heat prostration.

Mr. Enterline: Inasmuch as the witness has identified this as the original, I offer it so that I may cross-examine further on the matter.

(Plaintiffs' Exhibit O-P.)

Mr. Veazey: No objection.

EVIDENCE: PLAINTIFFS' EXHIBIT O-P

Great Falls, Mont., June 17, 1920.

Mr. I. Parker Veazey, Jr., Attorney at Law, Great Falls, Montana.

DEAR SIR:

Re Phelps et al. vs. Great Northern Railway Co.

We wish to submit to you this additional report on the L. C. Phelps cattle losses of July, 1917.

Additional Evidence

Dr. Nutting and Dr. Kesselring agree in saying that the cattle did not have difficult breathing, as would have been shown by open mouths, lolling tongues, etc. Dr. Nutting produced some of his original reports which show that several of the cattle ran temperatures which were not excessively high, 103, 104, 105, and up to 108 F. Dr. Nutting states positively that Dr. Nash never opened nor cut into any of the intestines while holding post-mortems on the Phelps cattle in the Great Northern Stockyards at Great Falls, and Dr. Kesselring "does not remember of seeing him cut into any of them."

Taking this additional evidence, together with all of the evidence which has been submitted before, and the history of the shipment of the Phelps cattle, and comparing all of the circumstances, anti and post-mortem, and comparing all of this with references contained in authoritative text books on diseases of cattle, we are of the mutual opinion that the Phelps cattle were affected with, and died from the effects of, a disease known as acute catarrhal enteritis (acute inflammation of the mucous membrane of the intestines). As to the differential diagnosis between catarrhal enteritis and heat stroke, which has been previously reported as the cause of the death of the cattle, we wish to submit the following characteristic symptoms which the cattle did show and which, when compared with the symptoms of acute catarrh-l enterities in cattle, as given by all of the text books, begins by showing distress symptoms of restlessness, abdominal pain, lying down, head turned to the side, sometimes [fol. 183] groaning, refusing to move, followed by some excitement, nervous disturbances exhibited by staring eyes and being easily excited in ap-roaching persons, upon further progress of the disease being unable to rise, especially upon the hind limbs, reddened muc-us membrane of the eyes and nose, finally approaching exhaustion being exhibited by inability of the animals to raise themselves from the ground at all, and in the last stages, lying and dying from exhaustion, the fever ranging, in this disease, from 2 to 4 degrees.

Post-mortem Findings According to Moussu and Dollar

"To study the l*i*sions to advantage an autopsy must be performed as soon as possible after death. In slight cases they consist of trifling generalized congestion of the intestinal muc-us membrane. Points most affected show infiltration of the submuc-us coat and sometimes of the muscular coat. The wall of the intestine is double its normal thickness but the thickness never equals that seen in cases of rapidly fatal intestinal congestion."

Since the inner coats of the intestinal walls were not examined at the time of the holding of the post mortems on the Phelps cattle at the Great Falls stockyards in Great Falls, we are compelled to assume that this condition existed, in the absence of any other post mortem findings, as given in reports of the post mortems, made at the time, which could have accounted for the sickness and death of the cattle, and also for the further reason that the cattle exhibited the antimortem symptoms of scours in some of them, which could have only come about in those cattle from some irritating inflam-ation of the mucus and submucus coats of the intestines, and also that upon the post mortem all of the reports show that the gall bladders were greatly distended and the liver somewhat enlarged, which we contend is a certain indication that there was a swelling of the coats of the gall duct, which inflam-ation must have been an extension of swelling of the coats of the small intestines where the gall duct empties into that portion known as the d*odeu*num.

As compared with heat stroke, the anti-mortem symptoms of the cattle would have been general weakness, dizziness, fainting attacks, coma and death, and the postmortem lesions would have been congestion of the lungs, the blood congested in the veins in the right side of the heart, which would have been markedly enlarged in the pulm*o*nary artery and in the liver and kidneys. The blood would have been noncoagulable owing to the destruction of the haemoglobin of its contents.

None of these symptoms were recognized by the veterinarians who observed the Phelps cattle. On the contrary, Dr. Keselring states that the blood coagulated quickly.

Cause

Our combined opinion is that the cause of the enteritis in the Phelps cattle comprehends the handling of the cattle from the [fol. 184] time they were started from the Pitchfork Ranch, or before to their arrival at Great Falls. That the principal predisposing causes were, the extreme heat of the season, irregular and insufficient watering and feeding on the trip from the ranch to Cody, Wyoming, insufficient time allowed for watering at the Cody Canal, the indigestible and irritating character of the feed the cattle got after watering at the Cody Canal and before being loaded on the cars at Cody, and finally the lack of drinking water for the cattle for the period of twenty or more hours before being loaded on the cars at Cody. Especially do we deplore and condemn the depriving of the Phelps cattle of water for hours just previous to being loaded on cars. On the other hand those cattle should have had access to water all of the time after their arrival at the Cody Canal on July 15th up to the time that they were loaded. This we hold was particularly true in the case of the Phelps cattle because of the strenuous trip which the cattle had been subjected to previous to their arrival at Cody. The extremely hot weather, the character of the feed allowed the cattle near Cody, and the trip by railroad which they were about to take.

We are, therefore, of the combined opinion that the disease and death of the Phelps cattle at Great Falls was wholly due to the negligent and improper way in which the cattle were handled previous to the time they were loaded on the cars at Cody.

Respectfully submitted, —— ——

That is a report which I signed addressed to the Attorney for the Great Northern.

Mr. Veazey: Just a moment. Did you say at the request of the Attorney of the Great Northern?

Mr. Enterline: Addressed to the Attorney. No, I wont say that you requested it, but naturally you know all about it. I know of course that you didn't expect to receive any such article.

I do not know where Knowles got the original of this. He lives in another city.

Q. Now, up to that time, what I am trying to get at now, what additional evidence did you receive when you signed this report other than you had from your post-mortem?

A. What other evidence I had besides my post-mortem?

Q. Up until June seventeen, 1920, what additional evidence did you receive upon which you signed the report which I just read to the jury other than was disclosed by your postmortem examination and your talk to Mr. Wright?

A. Well my attention was called to the post-mortem notes, that they did not conform——

Q. Oh, Doctor: I wish you would answer my question; I would like to have an answer direct. What additional evidence did you have when you signed this report in June seventeen, 1920, other than your post-mortem examination, whatever that disclosed?

A. I did not have any other notes.

[fol. 185] Q. And your talk to Mr. Wright, the caretaker, concerning which you testified?

A. I did not have anything outside of my notes.

Q. In this report you say that since the inner coats of the intestinal walls were not examined——

A. No sir, they were not.

Q. At the time of the holding of the post-mortem on the Phelps cattle, you are compelled to assume that this condition existed, what condition?

A. Why, the condition that it states there.

I refer to the conditions preceding that where we quote from the author. In other words, I am compelled to say, not knowing it, that the mucous membrane, or sub-mucous membrane, was affected.

Q. Very well now, how do you get at that conclusion if you didn't examine it and don't know?

A. Well, we didn't the intestine was not opened, and then——

Dr. Kesselring did not cut the intestine open and cut inside in my presence.

Q. Well now, assuming Doctor that he cut into the bowel, opened it?

A. Yes sir.

Q. And he found it in a normal condition inside——

A. Well, I told you he wouldn't find it unless he washed it off, the mucous coat, and it would not show.

Q. Assuming that it was normal, he found no inflamed condition on the inner wall, that is what he testifies to, now assuming that to be true, what do you say about enteritis?

A. Well, he didn't make a complete——

Q. Hold on now, answer my question. It is a question for the Jury whether he made it complete or not. Assuming that Dr. Kesselring cut the bowel open and the stomach and testified that it was normal, now assuming that those conditions are true, that it was normal, both the stomach inside and the bowel——

A. Then it was guess work.

Q. What was guess work?

A. That they had heat stroke, which he——

Q. Wait a minute. Do you still say that there was enteritis there, that is what I want to know?

A. Yes, I do.

I would suppose that a veterinarian who cuts open has an opportunity to see or observe is in a better position of observing than one who did not cut open the bowel.

Q. You were satisfied that it was heat prostration when you examined and cut into the animals, and therefore you did not cut open the bowel?

A. The bowel was not cut open.

I cut open two of the animals. When I cut them open, from the examination so far made, the post-mortem conducted by me, I was satisfied that it might have been heat prostration, without conducting any further post-mortem. There was always a doubt.

[fol. 186] Q. Why didn't you cut open the bowel then and stomach?

A. We expected to cut open more. I did not do it because it was an oversight. Referring to the cause that is given in the respect which I signed and which is presumed to be signed by Knowles, that the combined opinion is that the cause of enteritis in the Phelps cattle comprehends the handling of the cattle from the time they were started from the Pitchfork Ranch until or before their arrival at Great Falls, I referred to the handling after they commenced to round up and cut out there at the station and the Cody Canal. The reports reads farther that the principal predisposing causes were the extreme heat of the season, irregular and insufficient watering and feeding on the trip from the ranch to Cody, Wyoming, insufficient time allowed for watering at the Cody Canal, the indigestible and irritating character of the feed the cattle got after watering at the Cody Canal and before being loaded on the cars at Cody, and finally the lack of drinking water for the cattle for the period of twenty or more hours before being loaded on the cars at Cody.

Q. Now then, Doctor, what evidence did you have of the indigestible condition of the feed that they had taken when you did not cut open the bowel?

A. Well, I did not know at that time.

Q. You did not know it, and yet you signed that report?

A. Well, after his—it was called to my attention that the post-morteum *not* did not conform to heat stroke, then of course I knew it must be bowel trouble.

Q. But Doctor, do you understand me? Where did you have any evidence when you signed this report of indigestible food?

A. Well, I didn't rely altogether on the indigestible food, but on the manner of handling the cattle.

I am not particularly eliminating the indigestible food. I call this kind of enteritis that these cattle had acute cactarrhal enteritis.

Q. Now in the way of the condition of the bowels of the animals, is there any difference as to the condition of the bowel as would be disclosed by a post-mortem in acute catarrhal enteritis or gastro-enteritis, or simple non-toxic gastro-enteritis?

A. Well, in gastro-enteritis you have gas all through.

Q. Well, I know, but eliminate the gas. What is the condition of the bowel in gastro-enteritis other than the gas?

A. Well, you scrape off your mucous and on the sub-mucous you get little patches of blood-clot and that like.

You get that in catarrhal enteritis also. That would be pretty much the same in both. I recognize Friedberger and Frohner's Veterinary Pathology as an authority. Page 162 of Volume 2 of that work under the head of Pathological Notes reads as follows: "Examination of the stomach reveals considerable redness, either circumscribed or diffused, and varying in shade from light to dark." That is a condition I would expect to find in catarrhal enteritis, in the stomach.

Q. That is the condition you would find in the stomach?

A. That is acute catarrhal condition of the stomach.

The same author reads farther as follows: "The mucous membrane is dull and swollen, sometimes in folds and infiltrated with blood or [fol. 187] covered with potechial spots or larger dark red patches. The surface of the membrane is sometimes smooth, at others covered with tough or thin clear or blood-colored slime, and again it reveals small round or longish superficial ulcers in greater or less number, whose edges are sharp and even, their base at times smooth and at others covered with blood coagulæ (hæmorrhagic erosion)." That is in the stomach, but we have been talking about the intestines.

Q. Well, I am still on the stomach.

A. All right.

Q. Well, none of those conditions were found by Dr. Kesselring in this case?

A. He cut open the bowel but not the stomach.

Q. Oh yes, he cut open the stomach and testified to the jury about the four compartments of the stomach, and said it was normal. Now what do you say, do you still think it was enteritis?

A. Yes sir.

Now, going to the bowels, the text reads as follows: "In the bowels the mucous membrane is also red, swollen and dull, usually to a limited extent but sometimes all over or in dots, tooth or star shape or like network, and at times is marked with light or dark red spots, stripes or patches. It is also infiltrated with fluid, soft, tender and disintegrated to a pulp, or like tinder, occasionally covered with dry, disclored gangrenous scabs which are either firmly fixed or have been partly loosened by suppuration, and may have caused complete perforation of the intestinal wall." As to whether that would be a condition I would expect to find in acute catarrhal enteritis, I would expect to find that condition after it was there about two weeks. I could find some symptoms during the preceding time. As I told you, on the sub-mucous we would find some of those symptoms, but not as well marked as you have read there, because it had not run that long, but there would be some evidence of it. If I would assume that it was normal when he cut into the bowel I would not still be of the opinion that it was acute enteritis, because the animal would be well. You would have to get your heat prostration lesions. The symptoms of an animal when it is overcome with heat are panting, tongue out, dryness of the mucous membrane of the mouth, and nervousness. It may have com*ma*, and those that do not have com*ma*, if you go near them, will charge you. When I arrived at the opinion first that the cattle had died of heat prostration I based that on the excessive hot weather at the time and the over-crowding of the cars, and due to lack of water. We all had that in our minds at the time. I had that in my own mind at the time, and that is what I reported to the company first.

Redirect examination of L. A. Nutting by Mr. Veazey:

As regards enteritis, there is an acute enteritis and a chronic enteritis. Chronic enteritis can develop from an acute enteritis.

There is such a thing as an acute enteritis that results in death before it becomes chronic.

Q. Then, some of those symptoms that are shown in the book, [fol. 188] are those symptoms all found, in the passages that were read, are they always found in acute enteritis?

A. Yes sir.

That marking of the stomach is not found in enteritis; that would be inflammation of the coat of the stomach; that would be called gastric-enteritis. You could have the enteritis in the bowels or intestines without enteritis in the stomach. As regards the symptoms that would show up in the intestines if the enteritis were acute and did not last long enough to become chronic and the animal died from acute enteritis, I do not believe the symptoms in the intestines could be seen by simply opening up the intestine and looking at the inside of the wall without going down below that into the sub-mucous coat. The intestine of a cow is about one hundred and sixty-five or one hundred and sixty feet in length, the small intestine. This condition in the intestine which I say I am compelled to assume existed if there was enteritis, would not show up at all portions of the intestines. It could be in one place and then in another.

A. T. Knowles, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

At the request of my brother, A. D. Knowles, I went to Cody this month and got a sample of the salt sage there near the station. Mr. Bresnahan accompanied me and pointed out the place where the cattle in this case grazed that night. I have that sample with me. It is marked "No. 17." I would have to refer to my notes to know just the day I got it, but it was last week; it was the third day of December.

Mr. Veazey: We will offer this in evidence.

Mr. Enterline: We object to that as incompetent, irrelevant and immaterial unless it is shown that the salt sage would be in the same condition along in July of the year as it is in December.

Mr. Veazey: That stands to reason that a condition once existing is presumed to continue to exist.

Mr. Enterline: Sometimes it is green more than other times.

Mr. Veazey: Well, then it is worse, but this would be the most harmless form.

By the Court: I don't know. I have no way of knowing. It seems to me that there should be a little further showing in connection with that exhibit before it would be admissable. I don't know whether the condition of it would be the same in December as in July or not.

Mr. Veazey: The witness Kent says that at the time the cattle grazed on it it was more harmful than at this time.

Mr. Enterline: I don't think it is material Judge, I will withdraw the objection.

[fol. 189] (Which said defendant's exhibit 17 was thereupon received in evidence and is by this reference made a part of this Bill of Exceptions.)

No cross-examination.

A. D. Knowles, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is A. D. Knowles. I reside at Missoula, Montana. I have been practicing veterinary medicine for twenty-five years. I am a graduate of Kansas City Veterinary College. I graduated in 1906. My previous training had been a two years' study with two graduate veterinarians and one in the American Veterinary College in New York City, at which time this college gave all classes together and I attended all classes in the college. I have practiced since 1894. From 1894 on I have been engaged in the practice. I think I have heard all the testimony in this case. The report marked "Plaintiff's Exhibit O-P" which was read a few minutes ago was dictated by me. That was done after a conference with veterinarians. In reaching the conclusion which I reached on that report I had conferred with Dr. J. F. Mitchell of Great Falls, Dr. S. Kesselring and Dr. L. A. Nutting of the same place. Then after that I dictated the report. On receiving the typewritten copies following the dictation I signed that report. I did not see anybody else sign it.

The symptoms of heat stroke are that the animals first show a distress. As compared with the symptoms of enteritis, in heat stroke the animals show rapid breathing with a difficult breathing. The difficulty is exhibited in cattle by an open mouth and the tongue lolling out. That symptom is in heat stroke. This condition, after progressing, causes the animal to become stupid, dull and commatose. The difficulty of breathing increases with the progress of the disease, the animal finally gasping for breath and falling and dying as if smothering to death. That is in heat stroke. In *i*nteritis as compared to that the condition would be that the first symptom in enteritis is dullness. It is manifested by the animal drooping its ears, the ears hanging lower than normal, the head held lower than normal, rapid breathing, distress expression from the eyes, restlessness following. If the animal is free it separates itself from the herd, does not give any attention to other cattle nor things. I am limiting myself now to enteritis. This period of dullness is followed by more restlessness. The animal begins lying down and getting up, and evidencing pain of the body, of the intestines, by kicking at the body or lying down and getting up. For a time they will lie mostly and this is followed by a period of excitement in which the animals show a mania and become violent. They are easily excited by things in general and especially by persons. This is true of gentle or wild cattle. As the disease progresses the animal becomes very nervous, showing great prostration, unsteadiness of gait and bracing its feet as if about to fall until it is no longer able [fol. 190] to stand; then it becomes prostrate behind. Animals in this condition will continue to rise on their front feet after they are unable to get on their hind feet. The excitement continues more serious in this stage until the animal reaches a period of complete delirium. Prior to that condition if someone approaches the animal while it is down it will attempt to rise as long as it can handle itself, until this complete delirium overcomes them. It will rise and charge, fight, hook, throw their heads. After this period of complete delirium the animals are no longer able to rise; they lie flat on the ground with their mouths open and in a dying condition, and they finally get into a state of com*ma*, that is delirium of course. There is a difference between delirium and com*ma*. Com*ma* is a condition that precedes delirium, that is com*ma* does not belong to enteritis. There is a difference between com*ma* and delirium for the reason that delirium means a fatal unconsciousness; with com*ma* if the condition that is producing the unconsciousness is corrected the animal may recover. While the animal is in this state of delirium in enteritis it will throw its head to one side. As long as they lie on their breasts, after they are delirious, delirium has overcome them, that is the position that the animals assume.

Q. What other difference is there between the conditons of heat stroke or enteritis?

A. Ant*i*-mortem symptoms?

Q. Yes, if you prefer.

A. I don't think—with this enteritis, there are different forms of enteritis, and the different forms have slightly or considerably different symptoms. In the acute catarrhal enteritis there may be scouring or constipation. With general enteritis there is nearly always scouring. There is an elevation of temperature in either form of the disease.

There is an elevation of temperature both in heat stroke and in enteritis. As regards the post-mortem symptoms of heat stroke and enteritis, and how they compare, with heat stroke the first thing that presents itself to the operator is the reddening of the lungs; the lungs are thicker and heavier than normal, firmer on the touch. The normal lungs shows a crepitation or lightness to the touch of the hand, whereas a congested lung exhibits a firmness which is familiar to persons who are accustomed to making careful autopsies. If there were heat stroke which resulted in death the congestion of the lungs would not be such that the congestion could be seen only with difficulty; it would be very observable, it would be easily recognized. That is a characteristic symptom of heat stroke which absolutely must come, because that is what kills. In enteritis, if it is not complicated enteritis, the lungs are normal. In heat stroke the heart is enlarged, the veins are filled more than normal, the heart would be enlarged on the right side. No such symptom is found in enteritis. In heat stroke the blood is fluid and fails to co-gulate. In enteritis the blood is thicker than normal because of the existence of the fever and being normal otherwise coagulates quickly.

[fol. 191] Q. What other post-mortem differences are there between heat stroke and enteritis?

A. Enteritis is manifested in a number of different forms, and therefore the post-mortem findings would vary according to the form that would be described.

In comparing acute catarrhal enteritis with heat stroke, on opening the body cavity in acute catarrhal enteritis frequently the organs and intestines, stomachs and all other viscera appear normal except usually there is an enlargement of the gall-bladder.

Q. Are there any other characteristic symptoms between heat stroke and enteritis that you would regard as material in making a diagnosis for enteritis?

A. Well, sir, I would pursue the post-mortem.

I would divide the intestine from the stomach to the rectum. That would involve one hundred and seventy-five feet of intestines in the ox. I have had experience in examining cattle that were effected with enteritis. The symptoms of catarrhal enteritis, if it existed in the intestine, might, or it might not, reveal itself by simply opening the body of the animal without opening the intestine. In some cases, even in acute catarrhal enteritis, the desstruction of the walls of the intestine have pursued to the extent that it would cause a discloration of the bowel on what is known as the peritoneal surface, which is the outside surface. It is usually not possible for it to be seen on the outside. If you cut open the intestine of an animal that has acute catarrhal enteritis, that may or may not be sufficient to diagnose the trouble from what would be externally visible. If the intestines happen to be opened at a portion that is affected it would. If the opening is made at points along the intestine that were not involved, even though a careful examination were made of the intestinal wall at the time, it would not reveal the chatacteristics of the disease. I have had practical experience in that way. I should say that I have held post-mortem examinations on from twenty to forty cattle within the last three or four years that have died of acute catarrhal enteritis. When those animals died they were not the only ones that died; there were others which died. I selected those from time to time to make my post-mortem examinations on. In making a post-mortem, although it is enteritis, I do not fail to examine every organ and tissue of the body. I begin at the mouth, examining the mouth, which includes of course the tongue and back part of the mouth, the wind-pipe, beginning up at the upper part and of the esophagus, which means the tube which carries the food from the mouth to the stomach, tracing it to the lungs. I examine also for enlarged or inflamed lymphatic glands along the tract or in the region of the lungs, or of the shoulders, examining the lungs and the heart. Then I take the stomachs in the cow, thre are four. I open those stomachs first to observe whether there is any inflammation, and also to observe as to the condition of the contents and the amount of the contents. If an animal had acute catarrhal enteritis I would not expect to find any disease in the stomachs at all. There would be disease of the stomach in gastro-enteritis. If you have acute catarrhal enteritis [fol. 192] the condition of the stomach as to quantity of food and character of food would have a bearing not only upon the character of enteritis but the etiology, that is the cause of the enteritis. In cases of enteritis that I have had occasion to examine, the lack of food or the small amount of food found in the stomach was an important factor in making a diagnosis as to etiology. Etiology means cause. I will, for the sake of the jury and of counsel, leave out the technical terms, but I forgot. There is nothing further in regard to the stomach in connection with the evidence that I have heard in this case that would be diagnostic. The true stomach in these cases is usually empty; we usually find a small amount of food in the first and second stomachs, a certain amount of dry material in the third stomach and the fourth stomach is with very little or no food in it. In order to examine the intestine I take a pair of post-mortem sciccors and begin at the stomach and divide the intestine by clipping the entire length, at the same time examining the intestine, the mucous coat and the coats as they are divided, even to the extent of washing the fœcal matter, which means the dung, from the mucous surface of the intestines. If the entire one hundred and seventy-five feet of the intestine looks normal upon that treatment, that is washing it clean and then examining it, that would dispense with any further necessity of investigating the intestine to determine if there is catarrhal enteritis. If I found the first foot normal in acute catarrhal enteritis, I have found cases where there were patecia, that is little pin-point spots, little spots about the size of pin-points sometimes scattered and few, and there are other times when they are bunched or numerous. By washing the intestine carefully you can find those from just looking at the intestine after it is open. I used the naked eye for that. Speaking of the intestinal feature of an attack of acute catarrhal enteritis and those black spots which appear the size of a pin-point, as to size the spots would be the size of a pin-point. The size of the pin-point would be the minimum, and from that on up. They are mostly very small and located at variable paces along the mucous membrane of the small intestine. They would be without regularity as to the nearness which they would be together; they might be found from one in a place to two or more or even up to places where there would be an actual hemorrhage, which is really what they are. In order to find that on examination by the naked eye it is necessary to wash the foecal matter, that is the manure, from the surface of the inner coat of the intestine, in order to recognize the minutest ones and the fewer ones. If there is considerable hemorrhage it may be fairly readily recognized. As to whether or not it is necessary, in order to produce death from acute catarrhal enteritis, that there should be many of those pin-points shown on post-motten, I would say that it would not be just the pin-points that would produce it; it would be where the surface of the intestine has been denuded. I am trying to think of what would be a more simple term, but I do not think of it, that is where the mucous membrane will be raw, where the intestine will be raw in spots. I am able to give instances of death by enteritis where I have made post-mortem examinations, and am able to give [fol. 193] the number that died at the time and what the symptoms were which the animals showed. I had one instance in 1917. In that case out of a herd of about four hundred and fifty cattle between one hundred and fifty and two hundred of them died. I held a number of post-mortems on the dead cattle, some that had been dead for a few hours, others that had died—that is that I saw die, and others that were destroyed in the very advance stage of the disease, and held post-mortem on them. On holding the post-mortems one front leg was removed and then the side of the animal, including the ribs and the muscles of the entire side between the backbone, the hip, the front part of the body and the lower part of the abdomen and breast. Some of those animals did not exhibit any diseased condition, discoloration or otherwise to attract attention when I first opened them up. The rumen was nearly empty with those cases, some rumens containing from two to five gallons of very green grass with some fluid mixed with it. In the intestines in those cases I opened the entire tract for one hundred and seventy-five feet of the small intestine. The small intestine showed at various points along this tract on the surface, when clean, from the black pin-point exhibition or manifestation to numbers of them in groups and at various places along the tract there was a raw surface on the intestine. Some of those places would be from an inch to two inches long and all the way from an inch wide down. They would be irregularly distributed more or less throughout the intestinal tract. I could not say how far they would be apart as a maximum, or what the greatest distance apart would be.

I have been president of the Montana—I am a past-president of the Montana Veterinarian Association, and was secretary-treasurer of the association for nine years. I was also resident secretary for the State of Montana for the American Veterinary Medical Associasion.

In the course of my work as a veterinarian I have learned of instances where cattle have been standing in cars in very hot weather.

Q. Will you give me example of those, and of the effects that it has had on the animals?

A. I lived at Nevada, Missouri, from 1899 to 1906. That is a division point of the Missouri, Kansas and Texas Railway Company, and is the main line for——

By the Court: Let's get to the question. I don't care so much about the Missouri, Kansas & Texas Railway Company.

Mr. Veazey: I am asking him to explain the surrounding facts.

By the Court: I don't believe that is in any particular an answer to the question.

I saw trainloads of cattle at Nevada, Missouri, being shipped on the M. K. & T. railway from southern points to the northeastern market in summer. There were a great many trains. They usually, in the shipping season in the latter part of the summer, the trains ran by sections, which would mean several trainloads of cattle each day. They would be standing on the track variable lengths of time. [fol. 194] It was a division point and a regular place for inspection and repair of cars and all such things. I could not say how long they would stand there. I have seen them standing there for some hours, but I could not say just how long. I do not believe I could give the maximum and minimum length of time.

Q. Now, assuming in this case a herd of nine hundred and eithy-four animals was gathered in the vicinity of Pitchfork, Montana,—Pitchfork, Wyoming, that they were rounded up for some days before and arrived at a ranch at Pitchfork and they are then driven in, a distance varying from forty to forty-five miles, in a period of four days. They are watered the first night; they are driven from Pitchfork to a ranch where there is a stream seven miles the first day; the second day they are driven from that ranch to a stream, we will call it Meeteetse Creek, that being a distance of ten or twelve miles, and are watered there; they are then driven from that stream to a place called Sage Creek where the animals are driven through a lane about a half mile in length over the creek, watered only as they are driven over, passing through a passage way eighteen to twenty feet wide at one side of the bridge. They then pass over a ditch with water in it of a few inches, and again are driven right over that, and then are watered at this ditch and then taken up on the—on a plateau and close herded there for the night. The ditch in question would be a ditch about eighteen inches to two feet wide and an inch to three inches deep. They are taken away from that ditch there at once, or within a couple of hours, and then the next morning after being close herded during the night they are driven to the Cody Canal, a distance of ten miles, and upon their arrival at the canal they stampede for water and are there given a good fill of water. Thereafter they are taken away from the canal and allowed to graze, or some of them graze, on salt sage, taking a good fill of salt sage during the night. The next morning, without any further watering except such as it may be contended they received in passing over this canal as they were driven, a herd of nine hundred and eighty-four, but no deliberate stop being made for water, they are driven about two miles to a loading station. During this trip to Cody the weather has been warm. At Cody itself the temperature is around ninety. Upon their arrival at Cody they are cut out, that is to say a rider on horseback runs into the herd and picks out one animal; that animal makes a dash and he follows it with a horse and drives it out twenty-five yards or so; the animal then makes an effort to get back into the herd but is held out by the others; a rider then goes into the herd and picks out another and the process is repeated driving the animals out to a small group about twenty-five yards away, and that continues until the three-year-olds are all herded in one bunch and the herd is thus separated between the three-year-olds and yearlings. About nine-thirty to ten the process of loading begins, and is completed at sometime between three and four. During this time the weather is hot, the thermometer being around ninety and when a car is loaded they move that car on and spot another car and so that process keeps up [fol. 195] until thirty-two cars have been loaded, the three-year-olds being loaded first. Thereafter along sometime in the afternoon between three and four, after the loading has been completed, they move from Cody, Wyoming, to Mossmain, Montana, arriving at Mossmain on July sixteenth at eleven-ten P. M. and remaining there standing on the track from eleven, sometime after eleven P. M. eleven-twenty P. M. I think, until five o'clock in the morning, or according to the plaintiff until six o'clock in the morning of July seventeenth. The thermometer at this time ranging from about fifty-five degrees to about seventy, the maximum being seventy and the minimum about fifty-five degrees or fifty-two degrees. About two hours after their arrival at Mossmain the animals are seen going down in the cars. The attendant passes by and sees a few of the animals down in each car. He prods them up and they stand up. He then goes back in a little while and sees them down again, and more of them are down, and this keeps up during the night, more going down as the night is getting cooler until when they leave at five A. M. many of them refuse to get up and he is unable to prod them up. They continue on the train in transit from five or six o'clock in the morning at Mossmain until six to half past seven at Great Falls, where they are unloaded. On their being unloaded the animals, a few are found dead, the others get out of the car all right and finally a separation is made between those that are able to get along all right and those that must be treated as sick, there being about one hundred and fifty that are kept in the yards as sick, and of those in the end one hundred and forty-two die in the course of about two or three days, about two or three days, and a post-mortem is held on them and it is found that the heart is normal, the lungs are normal, the kidneys and liver are normal, and in the course of the progress of the diseases at Great Falls when the animals are unloaded they are down and it is found that they are down—that when they are down, when someone approaches them they try to struggle to their front feet, they are down in the back and they exhibit a fighting disposition, and what is called "on the prod" when anyone approaches them. Finally they fall down and a state of com*ma* takes place a-d death results. From that are you able to express an opinion as to what was the cause of the death of those animals, and when and when it originated, or are there any additional facts that you would have brought out?

A. I don't believe I understood the description of the symptoms of those cattle—oh yes I do too, I catch that now.

I am able to express an opinion as to the cause of the death of those animals. That opinion would be that the cattle were affected and died of acute catarrhal enteritis. Acute catarrhal enteritis develops on the inside of the body.

Q. Where would you say under this outline that the acute catarrhal enteritis began its incubation?

A. Upon this particular hypothesis?

Q. Yes.

A. Well sir, I should say—do I understand where it began, where the disease began?

[fol. 196] Q. Yes.

A. Or where the cause of the disease began?

I think the cause of the disease began with the beginning of the rounding up of the cattle, with the stirring of the cattle. The cattle being gathered were kept in motion more or less, of course; were taken from their usual range and collected in bunches or herds.

Q. Now, go ahead and describe the course of that disease as it progressed, if it did, up to the time of loading, on the hypothesis that I have described?

A. I don't think there was any disease before loading, if I understand you correctly. The cause of the disease or condition that led up to the disease which did develop after loading?

On account of the extremely hot weather and the disturbance of a number of days of those cattle, taking into consideration the strange range that they were on in which they were not eating their usual amount, and the movement causing greater effort to regulate their body temperature in hot weather by dissipating the water of the body, that is the body temperature is regulated by throwing the water off through the skin and lungs, which is called dissipating. On the account these animals were dissipating more water from their tissues than they were consuming each day, so that at the time they arrived and were loaded into the cars at Cody their tissues were without the normal amount of water in them. I would say that at the time they were loaded at Cody they might have been in condition to withstand an ordinary transit over a railroad in hot weather if it had not been for the character of feed that they had just previous to loading. I will enlarge on that, on the salt sage. Salt sage is a little shrub, a bush, which grows on the ranges in these western states, native, variable in height from a few inches to several inches, a foot or so. The feeding of salt sage would have the effect upon those cattle of increasing the necessity for water, that is because of the salt in the sage, it causes a pouring of the fluid into the intestines.

Q. How much salt would an animal have if it consumed varying quantities of salt sage?

A. Well, salt sage carries ten per cent. of salts.

Ordinarily an animal will consume from twenty to forty pounds of vegetation, and an animal feeding on that and getting a good feed from it would absorb from two to four pounds of those salts. The stems of salt sage are of a very woody nature. The stems are not so digestible as the leaves. The food value lies in the leaves of the plant. Assuming the facts under the hypothesis, and assuming that those animals have eaten this salt sage as stated, and have undergone this drive, I do not think that they would be able to withstand an ordinary transit from Cody to Great Falls over a railroad in hot weather.

Q. When would you say that—suppose that thereafter they were delayed at Mossmain from eleven o'clock in the evening until five o'clock the next morning, would that delay, standing in still in [fol. 197] cars on a side-track, be helpful or beneficial to them, or would it be injurious?

A. Well, that would be about the time for the beginning of the disease, and it, if arrested, it should not be injurious.

Very few animals ever recover from this disease. If the disease once sets in very few of the animals ever recover.

Cross-examination of A. D. Knowles by Mr. Enterline:

I was employed by the company in this case in March, I think, of 1920. Prior to that time I knew nothing about this case and the facts. After my employment I covered the evidence of the case as it was furnished me by Mr. Veazey in the form of affidavits, together with the history as given to me by the veterinarians, some of the veterinarians who attended with the cattle at the time they were sick, and talking with other persons who saw the cattle at the time they were in Great Falls, during the time they were there. I remembered being present in the Rainbow Hotel about two months ago or so, myself and Dr. Kesselring, the witness for the plaintiffs in this case, and Mitchell and Nutting. I had not prepared at that time a report or statement which I wanted Kesselring to sign. I prepared that statement several months before. At that time I did not read it to Kesselring and want him to sign it. I did not ask him to sign it right in the presence of Nutting. I did not read any statement to him for him to sign. I read a statement to him about the condition of the cattle.

Q. For the purpose of getting him to agree with you and the others, or what was your purpose?

A. Well, I—the report that I read to Dr. Kesselring and the other veterinarians was the identical report that I had read to—that I had—it was the opinion in the case which I had furnished to Mr. Veazey several months previous, a copy of this opinion, it wasn't the original but it was a copy of it, a carbon copy.

I did not hand a copy to Dr. Kesselring at the depot the next morning, you are mistaken, that is not the same copy.

Q. Well, do you know how Dr. Kesselring got this exhibit?

A. Well, this isn't the same one.

I prepared this but this is not the one you are talking about. I read the opinion that I had comp*lie*d for Mr. Veazey several months in advance. This was an opinion, or substitute opinion, or another opinion to be attached to the former opinion which we all came to an agreement on in the Rainbow Hotel, Dr. Kesselring, Dr. Nutting and Dr. Mitchell and myself. We all agreed on this opinion that night. We all agreed on this statement of facts, and I wrote or dictated this upon the following morning and furnished Dr. Kesselring with this copy. I dictated this opinion, Plaintiffs' Exhibit O-P, to Mr. Veazey's assistant in Mr. Veazey's office in Great Falls. I went to the office there and dictated the opinion as it is in this Plaintiffs' Exhibit O-P.

Q. What does the word "Re" mean?

A. I did not dictate that part of it.

[fol. 198] I told him to state the case; that was his statement; I told him to state the case; I told him to state the Phelps case and that I wanted to dictate the opinion.

Q. Which was Mr. Veazey's dictation and which was yours?

A. Mr. Veazey did not dictate any of it.

Q. Who dictated the "Re Phelps v. Great Northern"?

A. Mr. Veazey's assistant wrote that down. I did not dictate the words, but I dictated the substance. I told him to make the case, the title, Phelps against Great Northern.

That was in Mr. Veazey's office. I did not go there to prepare this at anybody's request. I do not think anybody requested me to go there at that time; I went there of my own volition. The purpose of my dictating that after having had the consultation with Kesselring was that it was the agreement between we four that I would have such a paper prepared, not necessarily at any special place, but I was to have such a report prepared by a stenographer, that is the agreement which I claim we all had at the Rainbow Hotel, that I was to have this prepared and furnish them a copy.

Q. Well, was that to be a copy of what you read to them at that time that you were just discussing, or some independent matter that you were to prepare?

A. This, in substance, was what was our conclusion, the suming up of our conclusion after studying the evidence in this case and comparing this evidence with the textbooks.

At that time I knew that Kesselring had been employed by Phelps to go there and conduct a post-mortem of those cattle.

My purpose was not necessarily to get Kesselring to sign this with the rest of us. One of my purposes was to talk this over with Dr. Kesselring and get the facts in the case as near as possible in order to come to a definite conclusion as to the facts on the cattle. Kesselring did not tell me that night that he could not agree with me on the statement that I was reading the statement or report that I made. Kesselring agreed that this statement, Plaintiff's Exhibit O-P, was the facts of the diagnosis. At that time I had the quotation from Nassau and Dollar there with me as it was written into my opinion to Mr. Veazey, so that that quotation was in that report that I read to them that night. I cannot remember just what else was in this Exhibit O-P and the report that I read to them that night. My previous report covered over twenty typewritten pages and I am not able to give you the contents of it. I have the report though, and can give it to you if you want it.

Q. No, you are telling your story. Now, prior to the time that you dictated this on June seventeen, 1920, or at the time that you dictated it on June seventeen, 1920, what facts did you have before you?

A. At the time I dictated this?

Q. Yes, and before you had the conversation with Kesselring at the Rainbow Hotel some two months ago?

A. Prior to the time of this dictation?

Q. Yes.

A. Well sir, I had a great number of affidavits and statements [fol. 199] from persons relative to the cattle, which of course I can not recall because it occupied a big roll of paper, together of course as I have already said with the statements made to me by some lay-men who saw the cattle and some of the veterinarians who attended them.

I came to the conclusion then after my investigation and conversation and examination of the affidavits that it was acute catarrhal enteritis. There might be a difference between that and gastro-enteritis and there might not be. Gastro-enteritis is not where gas is connected with the disease. I heard Dr. Nutting testify that that was true, but I am not responsible for that. As a matter of fact, gastro refers to the stomach and does not necessarily have anything to do with gas at all; it may have gas in connection with gastro-enteritis, but the term gastro has nothing to do with the gas, that pertains to the stomach, the true stomach. Gastro-enteritis would not necessarily be an inflammation of the stomach, it would be an inflammation of the stomach and intestines, both. When it affects the intestines it is not necessarily called gastro-intestinal-enteritis unless the stomach is involved. When the stomach and bowels are both involved you call it gastro-intestinal enteritis. I would say that this enteritis commenced when they rounded up the cattle on the hot day.

Q. Then, as I understand you Doctor——

A. Pardon me, did you say that enteritis began then?

A. No sir. Didn't you tell this jury that when they began to round up the cattle, before they reached the Pitchfork Ranch—there was when the enteritis commenced?

A. I did not.

The enteritis began some twelve hours or more after they consumed the salt sage. The assumption in the hypothetical question that they rounded up the cattle at the Pitchfork Ranch and traveled day after day for four or five days has some bearing upon my diagnosis, because the cattle were dissipating water from their tissues during this time because of the extreme heat and because of the increased travel that they were forced to do more than their normal and usual life. There would be nothing extraordinary on the first day travel of seven miles in Wyoming country where they had water. There would be no predisposing cause to give them enteritis in driving them seven miles on a range in a range country if they stopped there; if they had not been driven farther than that they would never have had enteritis. We are now at the end of one day's journey without any enteritis. If they are started the next day and go from ten to eleven miles and they have water that day and they are ranging along the open range, driven about ten miles, it is a hot day and they have rested the night before and they start out at five or six o'clock in the morning and then have rest and water in the evening, I would not see any reason for their getting enteritis that day. Assuming that they start the next day and they go through a lane where they are driven in a lane and across a creek, we will say, with little opportunity to drink water, and then they are driven over a ditch where they say there is very little opportunity [fol. 200] to water, and then they are put on a range and rest that night and then they go a distance of ten or eleven miles that day, I would say that I see no cause for enteritis that day. If they had not been driven any farther they would not have had enteritis. We are now at the end of the third day without enteritis. On the fourth day if they arrive at the Cody Canal where they have good drinking water for cattle, have an opporeunity to drink from four to seven o'lock that night and they are ranged around there near the canal. I would see no reason for them to get enteritis that day.

Q. Now, in the hypothetical question that you were asked you did not hear counsel say anything about feed at all to you, about the character of feed, and in your explanation you were talking aboat receiving a different feed than they had on their usual range. Where did you get that idea from?

A. Didn't the hypothetical question state that they were out on salt sage from the Cody Canal?

Q. I will refer to the question, I know it was not. Did not Mr. Veazey assume in his hypothetical question to you that they were put on different feed than their usual range?

A. Well, he said that they went on salt sage.

Q. Now, answer me, did he assume to you in the hypothetical question that they were put on different range at Cody than they were at their accustomed range?

A. No sir.

But he did say something about salt sage. Defendant's Exhibit 17 which you hand me is salt sage. That is what I express my opinion on when I testify as to salt sage. (Witness tastes some of the exhibit.) As to whether there is any difference between salt sage and sage brush, I would say that it is one of the varieties of sage. Sagebrush does not indicate anything except all of the different sages.

Q. Well, in this case do you take into consideration that the cattle were eating salt sage or sage brush?

A. The testimony shows that they were eating salt sage.

Q. So you are limiting your opinion on the salt sage?

A. That sagebrush includes the salt sage.

Q. Well, do you mean that they were eating the sagebrush and sage generally as you express your opinion?

A. Salt sage is sagebrush.

You understand that the botanical name for salt sage is atroplex.

Q. Well, we will just stick to the ordinary name, Doctor, because I know more about that. Now then Doctor, how much do you assume that the cattle ate of that salt sage in order to give your opinion?

A. It is not necessary as to quantity that they ate, but they probably ate twenty pounds or more of the salt sage.

Q. Well, in expressing your opinion do you assume or come to the conclusion that they did eat that much, or less?

A. I don't understand.

In expressing my opinion I assume, or come to the conclusion, that they ate twenty pounds, more or less, of the salt sage; that would [fol. 201] be about an average. In other words, I would assume that they had an average feed of this salt sage, as I call this exhibit.

Q. Now, what else did they have to do, if anything, at that point at Cody, to start this enteritis? We have them up there now without it.

A. Up to this time?

Q. Yes.

A. These cattle have been dissipating each day more water than their tissues have been re-supplied with.

I come to that conclusion, that they dissipated more water than they took in, because of the extremely hot weather. It is true enough that they were watered every day, but they were driven every day, they were in motion every day instead of being scattered over several thousand acres of pasture land in their native range. They were bunched and they were driven in a herd of nearly a thousand cattle in extremely hot weather, and in the process of equalizing their temperatures under those conditions it was necessary to throw off the tissues to keep from being overheated, getting too hot, and in so doing their tissues were deprived of more water than they would have otherwise contained on their usual range, so that at this point, while they were permitted ample time for filling their stomachs, that was not sufficient time to also replenish their tissues and still have a store of water in their stomachs to supply their tissues for future needs, and the salt sage, carrying a quantity of salt which might be variable as to the quantity, it is not important particularly, because the salt taken in, whether it was only a few ounces or more, or several ounces, it created a greater necessity for water than if the feed had not contained any salt and the dissipation of the tissues, the drawing of the water towards the intestines, which the salts do because of the affinity for water they cause when salts are taken into the intestines, it causes the water from the tissues to flow into the intestines and thereafter the surface of the body was deprived of its normal amount of water as well as the lungs for taking care of or counteracting the heat of the season.

Q. Well then, you would say that the enteritis commenced then at Cody. There were the causes before, the dissipation. Now then they got this salt sage, that creates a thirst for water, and did the enteritis commence then?

A. No sir.

The enteritis had not commenced yet. I would say that at the Cody Canal there was no enteritis, even after eating the salt sage. Assuming that the cattle started the next morning, go over this canal, the cattle have opportunity to water but they do not water unless the individual animal watered, they went right over this Cody Canal where they would have opportunity to water, but no effort is made to water them except as the individual animal drank, and we come down to the stock yards where they are ready to load on the train, and there cut them out at the train as counsel described to me in his hypothetical question and they are loaded; I do not think that they had any enteritis then after they were loaded. I do not think it had commenced then. Assuming that after they are loaded the train [fol. 202] is started within a short time after it is loaded and they run from there in a run of about seven hours from the time they are loaded and arrive at Mossmain at eleven-twenty that same night, and assuming that when they arrive there they are all in apparently good condition, but after two hours when the train arrives there and stands there they begin to go down; I would say under that assumption that they then had enteritis. It commenced some place between Cody and Mossmain. The cause of it between those points commenced before the cattle started from Cody.

We have covered the entire case up to the time of Cody, and then the heat and dissipation of the water and the consuming of the salt sage became a fatal condition for the cattle. As they proceed along in the hot sun the next day they get worse as they go along, the heat has something to do with it, the heat is distressing to the animals. We now arrive at Great Falls and some of them are showered with water, others are unloaded without that. Showering would have no effect at all on cattle affected with enteritis. It might help cool the fever a little, but so far as enteritis is concerned at that period, and with the symptoms as described, they were fatally sick. It did not make any difference whether they watered them or not. If they put cold water on them and they had enteritis I would not expect that the blood would be rushed to these weaker points where the inflam-ation was and make the animals worse. I do not think that condition would exist, because the blood is already rushed to these inflamed parts and the surface of the body is hot with fever which means some inflam-ation of the internal organs where the blood is congested. If the surface of the body is cooled it helps to reduce fever. It does not force the blood to the weaker spots where this inflam-ation is taking place. As to whether it does the animals good and helps the animals, I would say that it is one of the forms of treatment for the animals, but it did not help the animals because they were fatally sick. The treatment for acute catarrhal enteritis is intestinal antiseptics, mucilaginous drenches, fever regulator, medicine to reduce fever. If you do not give them any treatment for the intestinal tract the animal does not recover when they have that inflamed condition, not with acute catarrhal enteritis. I would not say that this whole shipment was affected with acute catarrhal enteritis. Those that have showed those symptoms that have been described here were affected with acute catarrhal enteritis. Th- acute catarrhal enteritis in the animals which were down but did not die went to a chronic enteritis.

Q. Oh, those that died went into chronic enteritis?

A. Yes.

That commenced a few days thereafter. I could not tell this jury when the chronic enteritis started, even if I were there over the animal. There is no line of demarcation of the time between an attack of acute, sub-acute and chronic enteritis.

Q. What is the difference between chronic enteritis and an acute attack, what different symptoms are in those two situations?

A. Chronic enteritis following acute enteritis of course is what [fol. 203] you want. There is a chronic enteritis that has no relation to acute enteritis.

Restricting our examination to the cattle in question and to any symptoms outwardly or inwardly that I know in this case, I would say that with chronic enteritis the animals would not show as high fever as with acute interitis; they would not be as nervous as with acute enteritis, the passages from the bowels would be covered with, or carry with it, flakes of mucous which looked like membrane, or streaked with blood. There is nothing in this case that shows that the foeces in this case are under investigation, either in the hypothetical question or that there was any blood, because we are not talking about chronic enteritis. Some of the cattle that lived had chronic enteritis.

Now, I am talking about the dead ones now.

Mr. Veazey: Counsel has misunderstood the witness. He said those that died had acute enteritis, and those that lived had chronic enteritis.

Those that died simply had the acute attack; some may have died with chronic attack. It is possible that some may have recovered,—I have seen some recover at that.

Q. I want you to tell the jury where you have in this case any blood in the foeces.

A. We have not had any chronic enteritis before; nobody has described any chronic enteritis.

I did not say awhile ago that some of these cattle had chronic enteritis. I took your hypothesis, I was not answering on the cattle in question at all, I answered your question, I did not say anything about these cattle, I do not know whether any of them had chronic enteritis, I did not have any symptoms on the cattle except those that suffered from acute catarrhal enteritis, there has not been any symptoms of chronic enteritis given here. Animals with an acute attack of enteritis are in pain as long as they have consciousness; as long as they are conscious they have pain. They may, or may not, evidence that my groaning. I do not know if there was any groaning in this case by all of the animals which died.

Q. Well, you know it has not been assumed to you?

A. It is not a diagnostic symptom.

They do not do that. I have seen two hundred of them down with that and not one of them groaning. I spoke about animals scouring. I have seen lots of animals that scoured that never had enteritis, just by running or heat, but that is not scouring; that is not what is termed scouring. Scouring is a pathological condition, a symptom of inflamed condition of the intestine, evidenced by rapid and frequent fluid evacuation of the bowels. It may or may not be accompanied by mucous.

Q. Did you ever see an animal with such a discharge without having enteritis as you have just described now?

A. Without enteritis?

[fol. 204] Q. Yes.

A. Well, that is a symptom of enteritis. I have seen animals that scoured without having held a post-mortem on them. That is a symptom of an inflamed condition of the mucous membrane.

Where these animals died and where a post-mortem was held and the bowel did not show any evidence at all; that is any external evidence on the bowel of any swelling or any spots on it, or even inside when cut open, apparently was in normal condition, I would still say that they had enteritis.

Q. With, or without spots?

A. I say they had enteritis.

Q. Whether they had any inflam-ation or inflamed condition of the bowel or not?

A. Well I talked to Dr. Kesselring——

Q. Never mind about that. I am talking about the bowel.

A. On the surface?

Q. I am assuming to you that there is inflam-ation of the inside of the bowel.

A. Let's see what the question is.

Q. The bowel was apparently normal, stomach was normal, outside appearance and inside when cut open, and the intestinal tract when cut open appeared normal on the surface outside and on the surface of the walls inside. Would you say that that animal died of enteritis?

A. Well, I don't know what the symptoms were of this animal.

Q. Take all the symptoms that you have there in this hypothetical question?

A. Well, they are incompatible, they do not correspond.

Q. You were not asked to assume that they had spots or did not, now I will take the question put you by counsel and put to that, assuming that the stomach was normal both inside and out, and both the outside as well as the inside of the intestine appeared to be normal——

A. I would say that the post mortem was not properly held.

Q. Would you say that the animal did have enteritis then?

A. I would say that the evidence was not sufficient to form an opinion.

In addition to the hypothetical question that was propounded to me I would not want any other facts to know positively that they had enteritis. I am sure from the question that was propounded.

Q. Now, in the question that was propounded to you what condition did you take into consideration of the internal organs of the animals, if any, to base you- opinion upon?

A. I based my diagnosis upon what is known as diagnosis by exclusion.

Q. I am assuming—that is very definite Doctor—I am asking you in forming your opinion on the hypothetical question propounded to you, what you assumed the condition of the internal organs to be?

A. What I assumed the condition of the internal organs were? [fol. 205] I beg pardon, I am not trying to bother you, I am trying to get an understanding.

Q. You are not bothering me a bit.

A. Well, I mean I am not trying to evade the question.

In forming my opinion on the hypothetical question propounded to me I assumed that there was a catarrhal inflammation of the intestine.

Q. That is, you assumed that whether that condition existed or not?

A. I assume it from—you asked me to give my opinion as to the hypothetical question.

In the hypothetical question it was assumed to me particularly that the internal organs of these animals were in an ordinary normal condition. That did not include the stomach, liver, heart and bowels. They are not organs: they are viscera. It was not assumed that the viscera were normal.

Q. Well, that is what I am trying to get at, what was abnormal upon which you based your opinion that it was enteritis?

Mr. Veazey: It seems to me that the witness has answered the question again and again.

By the Court: Overruled.

A. The symptoms as given, the ant*i*-mortem symptoms as given in the hypothetical question were typical of gastro-enteritis. To differentiate between—or with I should say acute catarrhal enteritis. I don't wish to put that gastro in there, but to differentiate between those for instance and heat stroke, which is also included——

By the Court: Well, before we get clear off let's try and answer the question. Read the question.

(Question read.)

Q. I mean the abnormal condition of the viscera and the internal organs. Now what was abnormal in the question propounded to you?

A. For my diagnosis?

Q. Yes.

A. The lungs, heart and kidneys were normal, and the blood coagulated quickly, which was an abnormal condition to accompany heat stroke.

Q. I am talking about enteritis?

A. Didn't you ask me to state what my conclusions are?

Q. Yes, for enteritis. Now the coagulation of the blood then is one of the things?

A. For what?

Q. For enteritis

A. Yes sir.

Q. Now, what else was abnormal there for enteritis, now let's stick to our enteritis, what in the viscera or internal organs was there now other than the blood coagulation?

[fol. 206] A. I am taking into consideration the ant*i*-mortem symptoms am I not?

Q. I am taking into consideration the abnormal conditions.

A. Well sir, there is no abnormal conditions there, the animal was dead. You don't give me any chance to give you a diagnosis. The animal could not die without some pathological change.

Q. In other words, with the viscera and other organs healthy you still pronounce the animal to have enteritis?

A. I would say that they were not healthy, it is incompatible, it could not exist.

I would say that the intestines were unhealthy. From the question propounded to me I would say that the unhealthy condition of the intestines was the mucous and sub-mucous coat probably was inflamed. There is evidence in this case to me that the sub-mucous coat was inflamed. It was not put to me in the question that I was asked that I was to assume that the sub-mucous coat was inflamed.

Q. Very well then, it is normal isn't it, in the absence of some evidence?

A. I don't think I understand you.

Q. Well, unless you have some facts Doctor to show that that was inflamed, the sub-mucous coat, you have nothing before you, or do you assume that it was inflamed, notwithstanding there is no evidence showing that; what I am trying to get at is, do you assume now that the sub-mucous coat of the intestines of these animals were inflamed?

A. I do, sir.

On the hypothetical question propounded to me I come to that conclusion from the fact that from the symptoms, from the anti-mortem symptoms that these animals showed which are typical of acute gatro intestinal trouble, and upon the post-mortem examination all organs were normal except the viscera, which were not properly examined. By reason of the fact that they were not properly examined I came to the conclusion that they were inflamed, together with the symptoms anti-mortem. These animals could not die without some pathological change. I am not prepared to say that an animal cannot die of heat prostration; they die of heat prostration; I have seen them die of that and I have held post-mortems on them for that too. This one hundred and fifty to two hundred head that I examined was near Anaconda, Montana, in 1917, about the month of June, I think it was about the latter part of June. Engorging of cold water was the cause of their enteritis, gorging themselves with cold water was the final cause. There were contributing causes, a trip on the train in very hot weather after being grazed on very short, soft grass. The animals arrived at destination with very little food in their stomachs, which was of this green, washy nature, and being permitted to engorge water that was almost ice-cold for a period of twelve hours without any feed. They got this ice water in the hot summer month in Mill Creek. The water was coming from snow drifts about four miles upon a mountain side. They began showing sickness in about eighteen hours after drinking [fol. 207] the water, that is they were observed showing sickness in about eighteen hours, they might have been affected somewhat at a time previous to that. That water which they got was not some of the washings of the mines there, there was no mines.

Q. Nothing from the smelter?

A. This did not come from the smelter, it came from up on the mountain side.

The poisonous materials settle on the grass there and then the water came from that situation. I do not know that the diagnosis there or the final conclusion was that those cattle died from the arsenic poisoning of the cattle and the company paid for them afterwards. The company made a settlement for the cattle, but not because there was any poisoning.

Q. They settled after you ma*k*e your report and stated the diagnosis?

A. They didn't admit there was any poisoning in settling their case; in fact there were no animals that had any poison in them; the chemical analysis showed no poison.

With reference to salt sage and the effect that has when an animal eats it as to enteritis and the manner in which it contributes to enteritis; it is not necessarily a cause of enteritis, animals eat and thrive on it, but it is like a great many other plants that cause disease at different times under various conditions. If the animals eat the salt sage and have nothing else to eat on, in a condition such as these animals were, with the tissues dissipated to that extent, it becomes indigestible, largely indigestible, the salts contained in the woody fibre and wood becomes an irritant to the intestines, together with the heat of the times, the season, helps to produce the indigestion, excitement and all those things.

Q. You think then it first was the indigestion?

A. Well there were a lot of indigestible materials in that. There was a lot of this material that passed through undigested, and because of it is of a woody nature, stems and so on.

Redirect examination of A. D. Knowles by Mr. Veazey:

Diagnosis by exclusion is making a differential diagnosis between, or among, two or more diseases, finding that the symptoms which may include both anti-mortem and post-mortem do not correspond with any other disease, therefore the symptoms which may be somewhat similar in the other disease must be taken to account for the disease that is diagnozed by exclusion. In making a diagnosis a person will take into consideration both the anti-mortem, or before death, symptoms, and after death symptoms, and frequently the history of the case has much to do with it. If a veterinarian is treating an animal prior to death he cannot get at the post-mortem symptoms. By examining the before death symptoms a veterinarian treats the animal on the basis that inside he will find certain symptoms.

Q. But according to Dr. Enterline it would be impossible to anticipate what those inside symptoms would be, or to treat a patient or animal without first killing them, isn't that true?

[fol. 208] A. I don't catch that question.

Q. According to the theory of Dr. Enterline when he was examining you, isn't it true that if a doctor were treating a patient or veterinary surgeon were treating an animal based on the symptoms before death he would not know what to do or what the disease was until he first killed the patient and found out the postanti-mortem symptoms and then doctor him for it?

A. I believe that is what Mr. Enterline was trying to infer. In other words, by the process of exclusion you can take certain symptoms before death and then you anticipate that if you perform an operation you will find those things, that is that you will find other symptoms inside.

Q. If a person gives certain symptoms of a pain in the side similar to an appendicitis patient the doctor by exclusion, is he able to anticipate that the appendix is inflamed?

Mr. Enterline: Objected to as leading and immaterial in this case.

By the Court: The objection is sustained.

I would apply that principle in this case in this way, that these animals showed some symptoms before death which might be taken for heat stroke or enteritis either, but upon post-mortem the post-mortem findings did not corroborate the diagnosis for heat stroke. There was no redness of the lungs and no thickening or heavy firmness of the lungs, and there was no enlarged heart, and the blood did not fail to coagulate.

When I say that the enteritis commenced between Cody and Mossmain I mean that the disease would not begin for twelve hours to several hours, twenty-four to thirty-six or sometimes even more, after the cause of the disease. I think it can be stated positively that the enteritis had not started before the animals were loaded at Cody.

Q. Where would you say that the enteritis itself started?

A. I would say that it existed——

By the Court: That has been gone over a time or two; I don't think that is proper redirect examination; I will sustain an objection to it.

Where there are several animals in the herd, say for instance there are nine hundred and eighty-four animals in the herd and they go through more or less of the same experience, it is not necessary that all of the animals in the herd should be affected with the same affliction that some of them apparently show. It is not necessary therefore in this herd of nine hundred and eighty-four that all of them should have had enteritis. In giving the cause of the enteritis in this case which I found I would not say it was any one cause. I took into consideration what would be the three principal causes, the heat, the exertion and the salt sage. I spoke of being employed in this case. That is not a regular employment by the Great Northern; I was asked to render an opinion on the case after being furnished with certain affidavits and such information as I could get, as I have already enumerated.

[fol. 209] Q. In a case where some one hundred and fifty animals die as a result of enterits as you say, how many would you expect to be in a swol-en condition after death?

A. How long after death?

Q. Well, fix your own time.

A. Well, if it was three days after death they would be swelled up, all of them. If they were dead after enteritis they would be swollen up also. That is not necessarily a disease where the bowels become inflamed and the intestines swell up and the animal is swollen immediately after death. If you shoot an animal and he dies he will often swell up after death.

Q. Is that such a disease as would naturally cause swelling?

A. Well, they may have a little tympany with that.

W. J. ENBREE, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is W. J. Enbree. I reside in Chicago. I am a graduate of the Chicago Veterinary College in 1910. Since that time I have had about three and one-half years of country practice and about three and one-half years of serum experience, and for the past three years or close to three years I have been employed by the Western Weighing and Inspection Bureau, with headquarters at Chicago. I have charge of the veterinarian inspection with the Western Weighing Association. I hold the title of Chief Veterinarian. I heard the hypothetical question which was propounded to Dr. Knowles by Mr. Veazey. Counsel has gone over with me the evidence of the plaintiffs and the evidence of the defendant in this case. From reviewing that evidence I have formed an opinion as to the possible causes of the death of those animals.

Assuming the facts as they have been narrated in the question to Dr. Knowles to be true, and assuming the further facts that the range on which those animals were fed did not have salt sage and that they were ranging on the plains and were driven to Cody as has been stated and then loaded on the cars at Cody and had this transit to Great Falls and died at Great Falls, and that when unloaded there they were on the prod, or were down in the back, or that some of them when unloaded, according to the plaintiff, went rather early into a state of com*ma* and were quiet; I would figure from the clinical picture of the cause of their death that it was caused by some acute inflammatory trouble.

Q. Are there any other causes that could be there, on the questions assumed or the assumptions made or evidence introduced by the plaintiffs?

Mr. Enterline: Now, we object to that, unless he has heard the evidence introduced by the plaintiffs. What you talked over with [fol. 210] him and what you put in the question before would not be competent.

If you would assume to me that the animals when unloaded were not down in the back, that they were quiet and went into a state of com*ma*, I would say that that would be more indicative of over-heat probably. That trouble would be called heat prostration or heat exhaustion, or heat stroke as it might be called. As a third possible cause of their death it might indicate hyperaemia or congestion of the brain, or enlarged nerve center. There would be three possible causes of their death under the symptoms given in the hypothetical question.

Q. Now, will you state to the jury the symptoms that you would expect to be revealed in the case of heat stroke, and symptoms that you would expect to be revealed in the case of enteritis, and the symptoms that you would expect to be revealed—what was this third one that you spoke of?

A. Hyperæmia of the brain, call it congestion of the brain.

Q. And how you would diagnose between the two?

A. The differentiation of diagnosis on clinical symptoms would be close. In your enteritis——

Q. Now, if I may ask you, I am not an expert veterinarian, if I might ask you to enlarge so that the jury may understand the three of them.

A. In enteritis there would be considerable evidence of pain and the animal would eventually go down in the hind quarters and would undoubtedly, from the pain, be on the prod, as they say, or show evidence of excitement, nervous excitement, and would go into a state of delirium, and maybe eventually com*ma* prior to death. In over-heat we would have nervous excitement or in the effects of over-heat we would have nervous excitement and to some extent a staring eye and a craziness of the animal, and eventually com*ma*, which means comatose or sleeping state, which might result in the death or the animal might recover. The congestion of the brain would be quite similar to the—excuse me, I won't go into that just yet. Also in your heat stroke you would have some difficulty in breathing, and death is usually caused by congestion of the lungs. In your congestion of the brain you would have the symptoms of heat stroke almost exclusively, with the exception that you would not have the difficult breathing or the congestion of the lungs. The congestion of the brain would be staring of the eye and wildness and general nervousness.

As to whether heat has any effect upon any of those diseases, heat is a predisposing cause for most any inflammatory disease. Those are all inflammatory diseases, that is they can eventually result in inflammation. On the facts assumed, and assuming that the evidence shows varying facts, my diagnosis as to the actual death of these animals would be that the clinical picture that has been brought out in these cases indicates inflammation of the bowels more than anything else as to the actual cause of death, but whether they all died from the same cause and whether there was a varying line of symptoms is a question. The effects of the heat would be [fol. 211] the principal other cause that could exist. Those other causes would simply be the result of heat to which they were subjected. Under the facts assumed those other causes would start to operate on their trip prior to being loaded and at the time of loading at Cody. I would explain the nature of wild steers on the range and the way in which they stand a journey to a railroad track and stand being driven and otherwise interfering with their condition other than being on their natural range by saying that the big thing is the transportation of steers from the range to the railroad track—and when I say steers I mean cattle generally—is that they are under abnormal condtions. They are used to being on the range subject to their own minds and quiet; they are rounded up and herded together and started on the trail for the market; their grass may be plentiful or it may not, or they may have water and they may not, but they are under abnormal conditions, that is they are not in the same condition that they are used to being in, and anything that changes the normality of an animil's life has a tendency to reduce his resisting power against any disease which might attack him. You have in this case the fact that they were trailed seven miles a day to start with. That would not be much of a trip for these steers but it was probably farther than they had walked at any time previous. The next day maybe they traveled twice that far and the next day and probably the next day farther than that. An animal that ruminates, chews his cud, requires more time to rest and chew his cud for mastication and whenever this ruminating period or digestive period is disturbed indigestion is bound to occur, and whenever his water supply is kept away from him, whenever he wants it, he will drink too much when he gets a chance to drink, and all of those things have a tendency to upset his digestive organs. For those reasons it is a very difficult matter to handle a herd properly in driving them forty miles, or any distance under hot weather conditions. Then further, as this animal moves nearer the market the desire of the owner in many cases to cut out certain animals from the herd in order to facilitate loading, or facilitate handling when they get to their destination, is another condition to be taken into consideration. In hot weather any of you can draw a mental picture of a herd-cutting. The herd is herded together in the blazing sun with riders on each side to keep it together. A man goes in the herd with a cattle pony that invariably knows his business. He will get an animal to the outside; it starts away with a dash and tries to get back; somebody tries to dash in between him and the herd to keep him from getting back, and this process is repeated again and again. Maybe one animal is cut out at a time, or maybe more, but it is repeated and all the time the herd is agitated and crowded in there where the inside of the herd cannot get proper air. The horses get tired and hot. As they are cut out the cuttings are taken down to the loading chute; they are driven through the chute into the car; these are cattle that probably have never been near a fence before; they get scared the minute they get into the chute; they drive them into the car; they have never been under a [fol. 212] roof before; they are afraid of the roof; you have a condition of fright that is almost in cases enough to scare an animal to death, if that is possible; their hearts are palpitating, and in this condition you are likely to get most any result that might cause death. If the weather is extremely hot the effect upon the animals, if they are not properly handled, would be that you are likely to get over-heat, or heat stroke, whatever you have in mind to call it. Assuming the facts stated in your hypothetical question to Dr.

Knowles, my diagnosis in this case is in a broad way that those animals died from the effects of heat. As to the ultimate and proximate cause of death, I would raise a question whether it would hardly be a condition that would be called exactly heat stroke—you could hardly call it heat exhaustion. My idea of this case, if I may state it, is that the circulatory disturbance brought on by this handling of the animals, together with their disorganized digestive powers, produced acute inflammation which caused their death, and as their digestive organs were out of condition undoubtedly this inflammatory disease that caused death in most of them centered in the bowels. In some cases we may have had inflammation of the brain. In parallel cases where every animal has been carefully diagnosed and post-mortems held I have found a number of different causes of death in the same animals, all showing a dove-tailing bunch of symptoms that were alike to some extent and different to some extent on clinical symptoms, and showing different causes of death on post-mortems. With reference to the inflammatory condition which I spoke of and where we could locate it, I would say that we could have inflammation of the bowels, we could have congestion and inflammation of the brain, we could have possibly in some few cases—although I doubt it in this—we might have had some pneumonia inflammation of the lungs.

I have come in contact with cases where animals have been standing on the cars with the cars standing in hot weather on railroad tracks, and I have become acquainted with the effects of that upon the animals.

Q. Will you explain to the jury instances of that kind where animals have been on the cars, the cars standing a long time?

A. Are you referring to night or day standing, or both?

Q. Both and how that comes up in railroad operation or in any other operation?

A. Animals in transit have to work continually to maintain their position in the car. You can plainly see how when the car is in motion that every muscle of the animal's body is set, and he has to strain, and that he is continually on a strain in a way to maintain his position. When you understand that you can plainly see how a short rest from the motion of the car is plainly as beneficial to the animal in the car as a recess in the court room. I have seen them when they would stop for a few minutes, you will immediately see that the animals will relax and take a rest; therefore I do not consider that a short stopping of a train, say not to exceed [fol. 213] forty minutes to two hours, is injurious in any way to animals, to cattle in hot weather.

Q. What instances are there of stops being made beyond two hours in hot weather?

A. In connection with the scheduling of our large stock trains into our stock markets you will find that nearly all of those stock trains——

Mr. Enterline: I will object to the schedules, that is out of this case; it is incompetent.

By the Court: Sustained.

Nearly all of our stock trains on arriving at our large market, in arriving in the outside yards at the outside of the markets arrive in the early morning; in fact it is not un-sual for the yards to commence to fill with cattle at midnight.

Q. I want to limit your answer to the movements in hot weather?

A. I am speaking of movements in summer as well as in any other part of the year.

These cattle will spend the night going maybe four miles to the market, or to the loading chute, and maybe get there at seven o'clock in the morning. If this delay was occasioned in the night——

Mr. Enterline: I object to your arguing Doctor.

By the Court: The objection is sustained.

A. The death rate is very light on all such normal shipments.

Cross-examination of W. J. Enbree by Mr. Enterline:

I have had about ten years' experience since I graduated. I am stationed now with all my experience at Chicago, yes sir. I was not employed by the company to come out here to testify. I work for the Western Weighing and Inspection Bureau. I got a letter from Mr. E. C. Lewis the fourth day of December, 1920, asking me to come to this case if possible. E. C. Lewis is claim agent for the Great Northern Railway. I had heard of this loss before that time, but I knew none of the details. I have learned the details first since I have been here. I got here Saturday night. Prior to that time I had given it no particular thought or study.

I spoke of the animals in describing them as being liable to be on the prod. That is true as to all range stock when you approach it.

Q. So you would not place any particular significance on that fact, that the animals when approached had a tendency to jerk around or show a disposition to get up or fight or anything of that kind?

A. A man that was acquainted with animals could easily tell whether this animal was coming at him on account of its natural propensities or whether it was mad or whether it was delirious.

I cannt say that there is anything in the question that convinces [fol. 214] me that the animals in this case were delirious. Under the conditions which I described to the jury in loading cattle it is almost dangerous in summertime to load cattle under those conditions. If at this particular point thousands of cattle went out of there before in the summertime and never showed any bad effects at all in shipment, I would account for this particular shipment from the same range and the same place getting in this condition by saying that I would consider it a miracle if there were many herds handled exactly in the way that this was handled shipped in hot weather without loss, for the reason that I have been in and investigated so many cases that were handled similar to this where there was great loss. I do not necessarily know anything about or place any stress upon the range conditions over there in expressing my opinion. The cattle were under abnormal conditions whether the range was good or bad. If the range condition was poor the condition of the cattle would be ag-ravated. As to whether I saw anything in the question about any improped method of handling the cattle or any handling of the steers in question out of the ordinary in coming from the Pitchfork Ranch to Cody; I would say the time consumed was a little quick was all; they were loaded the fourth day—no they were loaded the fifth day, they started on the morning of the twelfth and went seven miles that day.

Q. And they had a rest all night and then they started on the morning of the thirteenth and traveled a distance of about ten miles and had a rest that night; were trailed again on the fourteenth, and on the fourteenth was when the defendant company claims that they had not good facilities to water on the fourteenth. On the fourth day they passed over a creek without being given any particular opportunity to water and over a ditch, and they were kept and night-herded, or left to graze around, and on the fifteenth—that is the fourth day they were driven the remaining distance, the entire distance being approximately forty-one miles, do you claim that that would excite cattle ordinarily, taken away from a range inside of some pasture?

A. I would prefer to spend more time on that trip.

Q. How many days would you consider a very safe method to pursue in the month of July, 1917, so that they would not be in that frantic condition that you have described?

A. They should have rested after cutting, before loading.

I would consume another day in the trip to the Cody Canal; I would like to see another day consumed in a trip like that.

Q. And you think that if another day had been consumed then that they would have arrived in very good condition do you?

A. On what are you basing that question?

Q. The way I have described to you and the way they put it to you in the hypothetical question.

A. Leaving out the digestive disturbance and the salt sage?

Q. Yes, I am talking now about the drive.

A. You're talking about the drive?

Q. Yes.

[fol. 215] A. If they had been rested another day I believe they ought to have been transported in a great deal better condition than they were.

Q. Where would you have that rest, at the end of the trip?

A. At least they should have been given a chance to cool off before being crowded into those cars.

My answer is that they should have been given a chance to cool off, that would consume another day. It would not make any particular difference when that other day was consumed, whether at the Cody Canal or after they cut them out at the stockyards, if they were allowed to rest. I would prefor that they would have this rest after they were cut out.

Now, with reference to the salt sage, of course I do not know anything about the condition of the range there in the question. From the hypothetical question I do not know how much the animals consumed there at the Cody Canal. As to whether the salt sage that they ate and the quantity, concerning which I do not know, affected them, I would say that any woody hard to digest substance that the animals might consume while in this tired hot condition would be a great disadvantage to them.

Q. Doctor, you can express an opinion just as clearly, can you, whether you know a little, a medium amount or a great quantity?

A. Are you speaking of the amount of salt sage that they consumed?

Q. Yes.

A. I would not be able to say how much they consumed.

Q. Well, not knowing how much they consumed kindly tell the jury whether you are basing your opinion, taking that factor into consideration, without knowing the quantity that they ate?

A. Well, I think that my answer covers that. I said any amount of hard woody substance which would be hard to digest that these animals might consume would be disadvantage to them.

An animal that ate a little quantity might not be affected as bad as the animal that ate more. The animal that ate a little probably would not be affected as bad as the animal that ate more.

Q. Then it would depend, Doctor, upon the quantity of salt sage that those animals would have consumed, or did consume?

A. My answer covers that, does it not? I said that the animal that ate a little would not be affected as much as the animal that ate more. I do not hardly know how I could qualify that, not knowing any more than I do about it.

With reference to the effect which the water at the Cody Canal would have on the animals, before the cutting out process, I would say that the amount of water that the thirsty animals would drink can be a disadvantage to them. I do not know from the hypothetical question how much they drank.

Q. Well, tell the jury whether you are taking into consideration then the water that they drank, whether it was a little or a great deal?

A. How could a man know how much they drank.

[fol. 216] Q. I am asking you whether you are taking the amount into consideration in your opinion?

A. They consumed three hours at the Cody Canal.

Q. You are still evading the question. Do you take into consideration the quantity of water that they drank, or whether they drank any water at all in basing your opinion? In other words did the drinking of water have any effect upon those animals?

A. Surely it did.

I do not know how much they drank. With reference to the failure to get water the next morning I would say that it would have been an advantage to them if they had had a drink the next morning. They should have had a little water before the shipment sooner before the shipment than they did. If they passed over a canal where there was a large quantity of water in it when they were being driven towards the Cody yards, or station, for the purpose of loading, an animal might have stopped to drink if it was allowed to. I do not know that if a herd of cattle are thirsty they would drink and a herd of cowboys could not drive them over the stream. I now that animals, when they are on the range, if they are thirsty that they will go to water and stampede to it, but such stampede can be stopped too, but if it is not stopped the animals will go on and get the water, and some of them die right when they are drinking.

Now, going on to the time when the cattle are over at the stockyards. Up to that time I have come to no conclusion that these animals are sick or anything the matter with them from the hypothetical question propounded to me, but the different factors that they have come in contact with would have a tendency to weaken their resisting power and produce diseases, and those factors are at work on them. I doubt from this cause and all that I know about it and the hypothetical question whether there was any clinical symptoms of sickness in these cattle when they were taken over to the Cody station.

Q. Now, they are cut out, the three-year-olds from the one-years, and then loaded. Now what do you think ought to have been done; should the loading have been stopped at the stockyards before they are made to shy at the roofs?

A. You cannot hinder them from shying.

Q. Well, what ought to have been done with them Doctor, according to your experience, after they are cut out and put in the yards there?

A. If the animals are loaded on a cool day or in the cool of the day——

Q. What ought to have been done, that is a plain question?

A. They should have been kept in the cool of the day to load.

They should have been kept until in the cool of the day to load. Assuming that they start in the morning at nine o'clock that day and cut them out until along about ten that day, and started at the Cody Canal, starting at about five o'clock in the morning, between five and six o'clock that morning of the sixteenth, we drive them about two miles to the station and then they are cut out, the three- [fol. 217] year-olds from the one-year-olds, and we begin to load along at ten o'clock, between ten and eleven, and continue that until the afternoon between three and four and load some nine hundred and eighty-four head in thirty-two cars, when they are cut out there, ready to load at the time described, I would say they should have been held until in the cool of the day to load. They should have been held until about ten o'clock that night, and loaded at night. If you assume to me that they left Cody within a short time after they were loaded and they arrived at Mossmain, a distance of one hundred and two miles, making a trip of about seven hours, and the testimony shows they arrived at Mossmain in this state and when they arrived here the caretaker who examined them found that they are all up and there is nothing the matter with them at all apparently, in good condition; I would say that there is no symptom of any disease developed from the question propounded. If you then assume that the caretaker says it is a warm night and within two after he gets there the cars are standing still and the cattle begin to go down and as the night goes on he prods them up; at first they get up rather readily and as the night goes on he has more difficulty in getting them up, and that is generally so along the train on the thirty-two cars, I would say that the disease was commencing to develop; the disease which would be developing would be whatever inflammatory disease was affecting these cattle, enteritis or any other disease that was commencing to develop in the cattle. It is hard to tell what they did have at that time. They were weak; they were feverish; they were hot and they were tired. The poor things welcomed a stop of the train to get a chance to rest.

Q. Would you place that on the same basis of a person riding on a train arriving at a hot station to get rested up?

A. I have traveled a good deal in the west and have not suffered a great deal with the heat at night.

Whether I was traveling in the west at night or not and the night was real hot, I did not feel rested when I got to the station. There is no difference in an animal when it is kept in a hot place. If you will assume to me that they start out the next morning and go along this railroad and it is a hot day and they are kept at a cutbank at one place and with cottonwood trees on the other side and no breeze stirring, and they begin to go down and go down a great deal more than they have before, I would say there would be no particular disadvantage to that; it would be a hypothesis and nobody could tell. If you assume that it was a hot day and they were kept there for more than an hour and they were going down more than they had before, and that it was more difficult and more difficult to get them up, I would say that any disease or inflammatory condition that had developed from the handling of these cattle the night before would be so far developed by the next day that a stop would not affect them.

Q. I am asking you whether that would be helpful or restful to them if they were standing there in the hot sun?

A. Whether it would be helpful to them?

Q. Yes, to keep them in the hot sun for over an hour?

[fol. 218] A. I told you I could not tell whether it would be helpful or disadvantageous.

Q. I understood you to say awhile ago on your direct examination that it would rest them up and be no particular disadvantage to them.

A. They do welcome a certain amount of rest. You specify the time.

If you specify a time of over an hour I would say that it would not be harmful to them and it would not be of any particular advantage to them; it would not matter either way. As to how long they would have to be kept there in the hot sun to do them any injury in the place designated in the preceding question, I would say that under experiments that I have conducted in watching cattle stopped in the hot sun no disadvantage was noticed in the breathing or in the cattle in the car until after they had stood still for three hours. The symptoms which I take into consideration at Great Falls where they are taken off, in order to form my opinion, would be the paralysis or partial paralysis of the hind quarters; the nervousness increasing to com*m*a and death indicates that there was something seriously the matter with them. Those symptoms which I have mentioned are the principal ones which I take into consideration in forming my opinion. I do not pay much attention to the post-mortem conditions. As I stated before, in making post-mortems on animals I do not like to form an opinion without a large number of the animals are carefully posted.

Q. Well then, in this question that is propounded to you do you entirely ignore the post-mortem conditions?

A. I would reach my conclusions on the history of the case and the clinical picture of the case. What I mean by that is the description of the animal, anti-mortem, before death.

Q. Well now, if I assume to you—I first want your opinion Doctor on what you call the cause of death of these animals?

A. I expect—I believe that there was considerable enteritis.

There was nothing in post-mortem to indicate to me that there was considerable enteritis. The post-mortem conditions do not necessarily indicate that there was no enteritis.

Q. Very well then, what was there in the post-mortem that in any manner indicated enteritis?

A. By exclusion, the fact that the entire length of the bowels were not examined.

The other organs were examined and found normal with the exception of the brain. There was no report made on the brain in any of these cases, therefore the only way that I have of figuring that there could have been any brain trouble was that some of the description described animals with affected brain. If you assume to me that one veterinarian who performed an autopsy testified that the internal organs and viscera were normal, that he opened the stomach and every compartment was normal, opened the intestine and cut through it and there was no inflammation anywhere either external or in the inner walls of the intestine, I would still say that [fol. 219] there was enteritis there because an opinion could not be based on a perfunctory examination.

Q. But I am assuming to you Doctor that the intestine was normal; you know what normal means don't you?

A. The animal was dead, wasn't it?

Q. Yes, but I am telling you that the testimony of this veterinarian, whether you believe him or not, that he testified that the internal viscera were normal; that he cut open the stomach and it was normal, both externally and internally; that he cut open the intestine, both externally and internally, and he found them to be normal, now assuming that, do you still say that there was enteritis there?

A. If the external and internal condition of the stomach was normal and the external and internal condition of the bowel was normal then the animal would not be sick, or dead, without there was some condition which caused his death.

Q. But I asked you if there was any evidence of enteritis there?

A. Not particularly, no sir.

Q. Well, in general?

A. Yes.

Q. Where in the animal?

A. Because this examination was only held on one animal; this animal may not have had enteritis.

Q. Now, on all the other post-mortems that were conducted there was no external evidence at all of any inflamed condition testified by any veterinarian?

A. But the internal condition in these cases was not covered.

An animal can have enteritis without showing on the exterior of the bowel. That is true where they die as a result of enteritis. I cannot tell you, except in a general way as I said before, what this particular animal to which you have directed my attention died of. Taking into consideration the hypothetical question propounded to me and the facts that you put to me in the question, I would say that that particular animal might have died from hyperaemia of the brain, caused by over-heat. That over-heating took place at Cody prior to and at the time of loading.

Q. I see, so they could get hyperaemia of the brain on the range but could not get it in a car from the heat?

A. When the range and the excitement was hotter and the excitement greater than their excitement in the car I would say that it would be the greatest cause of the two.

They could get hyperaemia of the brain on the cars. In the hypothetical question propounded to me, the fact that they sickened and died indicated to me that their digestive apparatus was out of order by eating the salt sage. That is as good an answer as I can make to that question.

Q. Then you would pronounce the animal, under those conditions that the digestive apparatus was out of order, could you, without knowing the condition of the stomach and intestines either, other than disclosed by the hypothetical question?

[fol. 220] A. The clinical picture in the hypothetical question would indicate digestive disturbance.

Q. The clinical picture, whatever that is?

A. Yes sir.

P. J. Nacey, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is P. J. Nacey. I reside at Culbertson, Montana. I have had about thirty-two years' experience in the running and shipping of stock. During the last six years I have shipped on an average each year in the neighborhood of one hundred and twenty-five or fifty cars of stock. I am acquainted with the proper method of watering and loading stock prior to their being shipped, and what should be done in the way of providing caretakers for them.

The number of three-year-old western steers which I would feel could be loaded to a thirty-six foot car would depend a good deal on the size of the steers. If they weighed a thousand pound I would say in the neighborhood of from twenty-two to twenty-four head could be loaded. If the weather was extremely warm, the temperature being around ninety, I would not want to load over twenty-four head to a thirty-six foot car. I would load as many as twenty-four if it was not too warm.

Q. What would you do about watering the animals, how much time would you allow to elapse before loading when the animals were received and get a fill of water?

A. Well, we usually water them late in the evening and make a dry camp and get in the yards in the morning and get them out of the yards about ten o'clock.

I water them late in the evening before we load. We generally start loading them at the yards so that we are out of the yards about ten o'clock in the morning. That would make ten or twelve hours probably before loading that I would water them in the ordinary shipment. I do not know how much difference I would allow on them in the hot summer weather, it would all depend on where the water was how handy it was. I have watered in the morning before we start to work our herd. If water was available the time which I would allow before I would water would depend on how far we were away from the yards, maybe a couple or three or four hours before we started to work the herd. If the weather was around ninety-one and the animals were given water between two and three o'clock of the afternoon before loading and then not watered again before loading, I would feel as though they should have had some water that morning before loading. If they were mine I would have watered them. If I assume that they were watered between four and seven of the evening before and the weather was very hot and the loading began about ten o'clock, I would not think that that was sufficient watering. As to the caretakers that should accompany a shipment of thirty-two cars, I would say that there should be at least [fol. 221] one experienced man, and I think there should be two men with that number of cattle. They should have an experienced man along in case they might have to take care of the cattle in case of an accident.

Q. Would a man engaged in shipping livestock in the exercise of reasonable care entrust thirty-two cars of cattle for a transit from Cody, Wyoming, to Seville, Montana, to the custody of one caretaker with no experience at all?

Mr. Enterline: That is objected to as incompetent, calling for the opinion of the witness, invading the province of the jury.

By the Court: The objection will be sustained.

Q. What use could an experienced caretaker be in charge of a stock shipment of thirty-two cars?

Mr. Enterline: That is objected to as incompetent and calling for an opinion of the witness.

By the Court: The objection is sustained.

Mr. Veazey: We offer to prove by the witness that in his judgment as an expert shipper of stock it would be useless to send an inexperienced caretaker in charge of the stock, and that in the ordinary transportation if the shipment went in charge of an experienced man conditions could frequently arise where the caretaker could correct conditions and protect the stock, where an inexperienced man would be useless, and an inexperienced man would not be able to tell whether there was something the matter with the cattle, since to an inexperienced person they would seem normal.

By the Court: Of course you are including in your offer a whole lot more than you attempted to include in your question, to which I sustained the objection.

Mr. Enterline: I object to the offer as incompetent, irrelevant and immaterial, and for the further reason that it calls for the conclusion of the witness and seeking to elicit some further facts, and for the reason that the offer is much broader than the question.

By the Court: The objection is sustained.

Mr. Veazey: I will offer to prove then that a reasonably careful shipper of livestock would not in the exercise of reasonable care entrust a shipment of thirty-two cars of livestock to one inexperienced caretaker.

Mr. Enterline: That is objected to as incompetent, calling for the opinion of the witness and invading the province of the jury.

By the Court: Sustained.

Exception.

Cross-examination of P. J. Nacey by Mr. Enterline:

I reside at Culbertson, Montana. The number of steers or animals put in any car depends somewhat upon her weight. If I had animals that weighed about a thousand pounds I would feel perfectly safe to put in twenty-four head in a thirty-six foot car, if it was not too warm. With reference to caretakers, I testified that there should [fol. 222] be one experienced man to accompany the shipment and one more. When the cattle go down the only thing that I do is to try to prod them and get them up. That is the usual duty of a caretaker where animals go down in transit. When you arrive at a station and go along and see that the animals are up, that is the usual duty of a caretaker. I have shipped stock long enough to understand that the caretaker does not run the train; that is run by the railroad company. So that anybody that went along with the shipment, whoever he was, when cattle go down his business is to prod them and get them up. That is the thing to be done while the cattle are in transit.

Redirect examination of P. J. Nacey by Mr. Veazey:

Besides prodding the animals up the caretaker looks over the cattle and sees that they are riding all right and if anything does happen to them he notifies the conductor, such as if the cattle got down and he could not get them up he would notify the conductor that he wanted to unload them at some station and get them up and such like.

George R. Jackson, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

I have had about twenty-eight years' experience in buying, raising and selling and shipping stock. I live in Lewistown, Montana. In hot summer weather where the temperature is around eighty or ninety the maximum number of three-year-olds that I think could be loaded to a thirty-six car, weighing about a thousand pounds, is twenty-two to twenty-three. As regards watering the animals, we usually water just before we commence to work the cattle, just before we commence to cut them out to get ready to load. We usually water them about two to three hours before the loading commences. If cattle were watered between two to three in the afternoon of one day and then the next day were brought two miles to the loading yards, the cutting out taking place the next morning, and were then loaded on the cars between ten and eleven o'clock and they were given no further water, I would say that those animals would not be apt to be able to stand a transit of twenty-four hours. I think they should have watered them before they were loaded. If they were watered between four and seven of the afternoon and not between two and three I would still think that that was not sufficient water for them. Considering the hot weather, the maximum time beyond loading which I think they could safely transport them without water would be from six to eight hours. With a shipment of livestock embracing thirty-two cars, I think there should be at least two caretakers sent in charge.

Q. What is the usual practice as regards experience of these caretakers?

[fol. 223] A. Well, there should be one man that had some experience I think.

Cross-examination of George R. Jackson by Mr. Enterline:

I take into consideration the weight of those animals being from ten fifty to eleven hundred pounds. I would say that twenty to twenty-three should go in a car, weighing ten hundred and fifty to eleven hundred pounds, in extremely hot weather.

Q. Now, Mr. Jackson, these cattle in question, some nine hundred and eighty-four head, assuming that they were taken to a big canal where there was opportunity to water, no difficulty, and they were watered along from four to seven o'clock of the day before they were put on the cars and they were taken back some distance from this canal where they grazed until the next morning between five and six o'clock and in going to the station where they were loaded they crossed right over this big canal of water, just in the ordinary driving of them, and then they began to load after they cut them out along about nine or ten o'clock the next morning; isn't that the ordinary way to ship?

A. I think they should have been watered the next morning before loading.

If they went right over this canal, I do not know whether if an animal was thirsty he would stop and drink or not, if they were driven across and did not have a chance to drink.

Q. Well, if an animal is thirsty and they drive nine hundred and eighty-four head with four or five men in charge of them, if an animal was really thirsty don't you think he would stop and drink?

A. They could be crowded across without drinking I think.

I would think there would be some difficulty in driving them across without drinking with a bunch of that size, if they were thirsty.

Q. And not only do they cross that canal but they cross another ditch another ditch before they get to the station, cross a canal with a lot of water in it and then another ditch with water in it, so that they cross practically two ditches—a canal and a ditch, that morning before they were cut out for the purpose of loading. Now, wouldn't that be the ordinary way to ship cattle?

A. In order to water them thoroughly they should be held on this water at least thirty minutes to an hour I should think.

Q. Do you think it would hurt them in the way I have described to load them on the train after they had an opportunity to water?

A. I think they should have been held on the water the next morning and given a fair chance to drink.

Q. I am asking you if you think that would hurt them in a shipment of say thirty hours, twenty-eight hours?

A. I do not know as I understand.

I would think it would hurt the cattle to go on a trip of twenty-eight hours or thirty hours or thirty-six hours with the watering as [fol. 224] you have described it to me; I think that would hurt them. I never did that myself. I never saw anybody do it and saw any bad results obtained. I have had no experience whatever as to that situation.

With regard to the caretaker who accompanies a shipment, the railroad is cutting down the number of men that go along with these shipments lately. The principal duties of a caretaker who accompanies a shipment are getting the cattle up that go down and seeing that they are properly attended to in the feed yards. If the cattle go down in the cars nothing more can be done than prod them up, except if they get in bad condition to have them unloaded. They must be stopped at a place to do that. Where there is one caretaker, or a dozen, so far as the animals going down in the car is concerned, all he can do, whether they stop at a station or anywhere else, is to go along the line of the train and prod the animals up. That is the purpose while the cattle are in transit. So far as getting the cattle up is concerned, that is all he can do, and take care of them in the feed yards as I said.

Redirect examination of George R. Jackson by Mr. Veazey:

Q. Could an inexperienced man tell whether there was anything the matter with the stock in transit?

Mr. Enterline: That is objected to as incompetent and calling for a conclusion of the witness.
By the Court: Sustained.
Mr. Veazey: We would like to offer to prove then that in determining whether something is wrong with an animal it is only the practiced eye that can tell it, that an animal would seem to be in good condition to an inexperienced person but the expert eye of a good caretaker would know whether something was the matter with the stock and would naturally be concerned with the condition.
Mr. Enterline: That is objected to as immaterial and calling for the conclusion of the witness, and for the farther reason that the evidence in this case discloses that the caretaker in this case was very much concerned with the animals.
By the Court: The objection is sustained.

Exception.

R. S. McFarland, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

My name is R. S. McFarland. I live here in Billings. I have had quite a lot of experience for the last thirty years I suppose in the buying and shipping of livestock, and the raising of livestock. During the last eleven years I would say that I have shipped something like seventy-five cars of stock on an average each year.
Q. What is the maximum number of three-year-old steers, weighing a thousand pounds, approximately a thousand pounds, that you [fol. 225] would permit to be shipped in a thirty-six foot car in hot summer weather with the thermometer between eighty and ninety?

Mr. Enterline: That is objected to as what the witness would permit; it is a question as what would be the ordinary amount.

I would say that twenty-four or twenty-five head of three-year-old steers would be the maximum number that can be safely loaded to a thirty-six foot car under those conditions. I think the maximum number of hours before loading began that the animals could be safely watered last would depend on how long it was going to be before they got water again after they were loaded. I would think they ought to be watered a couple or three hours before they were loaded. If they were going to take a trip of twenty-eight hours or thirty-six hours and they are watered between two and three of the afternoon of the day before, but they do not start on this journey of twenty-eight or thirty-six hours until the next afternoon, the loading beginning about ten o'clock in the morning, I would hardly think that if that was the last water that they were getting, the last fill or last opportunity to fill that they would get, that the animals would safely stand the transit.

As regards the number and experience of caretakers that are entrusted with animals in transit, I would say that they should have two caretakers with thirty cars of cattle anyway. If they did not have any experience I would say they were no good along at all. It is customary to send an experienced man along so that he will know what to do if anything happens, if any cattle get down.

Q. Do you know of any instance where thirty-two cars have ever before been sent in charge of one caretaker with no previous experience?

Mr. Enterline: That is objected to as immaterial, incompetent and irrelevant.

By the Court: Sustained.

Cross-examination of R. S. McFarland by Mr. Enterline:

If the animals in this case were watered from four to seven o'clock on the day of the fifteenth of July and then they were kept near this canal ranging away from it but not on it until the next morning between five and six o'clock when they were gathered up and driven towards the station where they were loaded and they crossed this canal which had plenty of water in it and another ditch with water in it along in the morning, without any special effort made to water them except as individual animal might drink as it would go across there if it wanted to, I would think they would certainly drink if they had a chance to if they were thirsty the next morning. If there were four or five men in charge of this big drove of nine hundred and eighty-four animals it would take considerable driving of an animal to get across there without his getting any water, but they would have to give them time to drink if they got any water. I have never had any experience in shipping cattle and in watering [fol. 226] under circumstances where any damage resulted. I have always shipped beef cattle and I would give them water if water was handy.

Q. Yes, and if it was not handy you do not give it to them?

A. I have never made any long ships, you understand.

Q. Now if this shipment was intended to go through in twenty-eight hours, or even thirty-six hours, at the time they were loaded, with a continuous passage of the train, you would not expect any bad results from that situation?

A. Well, thirty-six hours in extreme hot weather is too long for the cattle to be on the train and be without water. In cool weather it is all right because I have kept them on the train thirty-six hours and had no bad results.

In cool weather I have kept them on the train thirty-six hours and had no bad results. If they were run through in twenty-eight hours I could not say as to that.

So far as a caretaker is concerned who goes along with the animals, about all any person can do where the animals go down in the cars is to prod them and get them up, and that is a plenty to do too. If you don't prod them up they get killed. Of course when they get sick and you can't get them up, if you had a dozen men with you you could not do anything. If in this case they got down and even with prodding they could not be gotten up it would not make any difference if a dozen men were around there. If they got up when they were prodded, responded and got up, that is about all any person could do so far as getting them up in the cars when they were in the cars.

L. B. Mincugh, a witness called on behalf of the defendant, being first duly sworn, upon direct examination by Mr. Veazey testified as follows:

I reside at Harlem, Montana. I have had thirty-five years' experience in shipping and handling of livestock. I began in the year 1885. I took charge of Thomas O'Hanlon's cattle in Chouteau County in the northern part of the state. I have shipped for the last seven years for the Matador Land and Cattle Company on an average of eighty thousand head of cattle a year.

If the weather is extremely hot, the temperature being around eighty or ninety degrees, and the shipment is to be made in the summertime, I should say that a shipment of cattle should last be watered within three hours of the loading. If a shipment of steers is to be made in the hot weather of summer such as has been described, and the animals are given water between two and four or between four and seven of the day before loading and they are not given a fill of water the next day at all and are loaded on the cars about ten o'clock and the loading is completed between three and four o'clock, and if that transit was made in hot summer weather and the transit was of twenty-eight or thirty-six hours duration, I would say they possibly would stand a safe transit if they were not overloaded; they would possibly stand the transit but it would be detrimental to them.

[fol. 227] Q. Would you expect, even if they were not overloaded, would you expect keeping them off water that long in hot summer weather to result in their becoming prostrated by heat?

A. Well, they could be, yes sir.

In driving animals in a herd of say nine hundred and eighty-four, if the next morning they come to a canal and a ditch and the animals are kept in a herd and driven along, the animals would not secure enough water to speak of, because in order to water cattle they must have their own way about it; you can't drive cattle into a stream and water them without letting them drift up and down the stream to drink. The first cattle that go in will drink and keep moving ahead, and those will keep moving ahead that come after until they get a supply of water that they wish to drink. I would not call that an efficient way of watering cattle, that is just driving them across a canal or ditch in close herd. In the summer time in hot weather with the temperature between eighty and ninety degrees I would say the maximum number of animals that could be loaded to a thirty-six foot car, the animals being three-year -olds and weighing approximately one thousand pounds and being western range cattle, would be twenty-two at the outside. I would consider that loading beyond twenty-two and loading as many as twenty-six or twenty-seven might result in the death of the animals in transit. It is customary to send not more than two caretakers in charge of a stock train of thirty-two cars. I would consider that both of those caretakers needed experience.

Q. What does a caretaker do, and in what way would an inexperienced man be able to perform the duties of the caretaker?

Mr. Enterline: We object to that as calling for an opinion of the witness.

By the Court: The objection is sustained to the question in its present form.

The duties of a caretaker are to look after the cattle in the moving of the train and such as that and getting the cattle up if the cattle get down enroute and if they cannot get them up to stop and have them put off, stop and put off an animal that is down and cannot get up.

Q. Can an experienced person determine whether or not cattle are standing the transit properly?

Mr. Enterline: That is objected to as incompetent, and this same question has been sustained for some time, if Your Honor please. If there is any error in it it has been committed by the Court.

By the Court: The objection is sustained.

Mr. Veazey: I assume that we may be deemed to have asked that same question of all these witnesses, and we have made the same offer of proof as to each, and the same ruling and same objection; is that correct?

The Court: Yes.

I have myself personally gone with shipments of livestock in transit. In our Matador shipments I either accompany all trains [fol. 228] on the road or some part of the road I meet the train. I have accompanied them in August. We have started shipments in August. It was very hot temperature but I would not say how hot it was. I know it has been hot enough, it was very hot weather. I have had delays in shipments of that sort where the animals would be standing for as long as eight hours on a track. The animals showed the effect of slight shrinkage was all from that stop; they were going to market; the stop did not injure them or prostrate them. When they arrived on the market they sold at the tops so they ought to have been in pretty good condition. In this particular instance that I have given they had been on the cars before the stop I think between ten and eleven hours. I would not say positively just the time the stop was made; it was just previous to midnight. We went into a wreck just previous to midnight.

Q. And how long were you delayed by that wreck?

Mr. Enterline: I object to that as immaterial.
By the Court: The objection is sustained.

This occurred at Snowden, Montana, in the month of August, 917.

Cross-examination of L. B. Minugh by Mr. Enterline:

If in this case the cattle were bedded down or permitted to range way from this canal where there was plenty of water in it, where hey had op-ortunity to drink if they wanted to, to go where the anal was to drink during the night, if the animal was thirsty and ot kept away it would go down there and drink if it could. If t was given liberty it would certainly go to the water if it was thirsty.

Q. Now, in the next morning some four or five or perhaps four nen drove them across the canal, went over one canal and over a litch before they were loaded that day, the next morning between ive and six o'clock, and if an animal would be real thirsty wouldn't t drink?

A. Well, if they were drove across those creeks they could not rink.

They could not drink, there would be no chance, that is if they id not let them stop they could not drink.

Q. Now then, Mr. Minugh, if this practice obtained, thousands of ead of cattle were shipped the same way with no bad results where hey were watered the same way, you would not be prepared to say hat there was anything wrong about it?

A. I am a little bit deaf.

Q. Very well, I will speak a little louder then. If men who live n that vicinity handling thousands of head of cattle year in and ear out and loaded them there under the same conditions and no ad results followed where there were no delays along the road, nd it was the customary method adopted by them in the way of hipping cattle, you are not prepared to say that there was anything rong about this particular method of shipment, or rather of watering I should say?

fol. 229] A. Well, those ways would be different from our ways. Ve always figure that cattle should have water and especially in very arm weather, because if they are not watered you put them on the ars and the first thing they do when they get off the cars they want ater before they will eat and it is not a good principle.

If in this case the shipment was expected to go through in twenty-ight hours and that meant practically a continuous run of the train ithout any delays, and they were taken then from the place where hey arrived on to the range, I would not expect any bad results under hose conditions if the cat-le were not overloaded. I fixed the number o be loaded in a car at twenty-two. In estimating the size of a three-ear-old in fixing it at twenty-two in a car I would say that western attle, our cattle that are raised in the west here, a three-year-old as understand, of the type and breed of these cattle, would be a very poor specimen if he did not run from a thousand to eleven hundred pounds. If they were in good condition they would weigh eleven hundred pounds.

Q. I think the highest estimate by some witnesses was a thousand pounds?

A. Well of course I did not see the cattle anything more than if they were western range cattle.

If you tell me that the men in that vicinity who have handled cattle in the cars year in and year out put twenty-six to twenty-eight head in each car and they have done it without any bad results I would consider them very poor shippers and very poor cattle men, even though there were no bad results. If they are stock cattle it is going to hurt them, bound to hurt them loading them for beef.

Q. Well, but they were taking these up to put on the range, not to sell them.

A. Of course there is all kinds of years and conditions of ranges that you are going to and taking from which might make a difference.

Where you are taking them and the purpose of taking them and all those matters are taken into consideration.

Q. Now then, with men going along as caretakers, will you kindly tell me, Mr. Minugh, when an animal gets down and the fellow diligently prods it and tries to get it up and it gets up until they get sick and can't get up any more, now what would any other human being do?

A. I have seen caretakers that if they would do that I would prod them off the train. There is all the chance for the animal to lay down if they have room in the car. What I mean by caretaker, if he will go to a car and an animal is down he can tell if there is anything wrong.

I would not just let them lay there if there was anything wrong. If an animal is lying down and resting you should not get them up. The others do not have to tumble over them. The others can maintain their equilibrium even though they are not standing over the other animal.

Defendant rests.

[fol. 230] F. Kesselring, a witness called on behalf of the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I have testified in chief for the plaintiffs in this case. I know Dr. A. D. Knowles, one of the witnesses who testified for the defendant, and also Dr. Nutting, the veterinarian. I remember being in the Rainbow Hotel several months ago where I and Dr. Nutting and Dr. Knowles and Dr. Mitchell were present there. I remember the occasion of Dr. Knowles reading a statement, or report, about the condition and opinion of the animals in question. After he read the statement, or after I got through with it, I told him I could not agree with enteritis in those cattle. That evening I asked him for a copy of the statement that he had read to me or report.

Q. You may state to the jury whether or not this is the copy which he handed you (Handing the witness Exhibit O-P).

Mr. Veazey: We admit it is.
Mr. Enterline: Defendant admits that the Exhibit O-P was handed to the witness by Dr. Knowles the next morning.

Q. In the course of that conversation that you had there did Dr. Nutting say this in substance, after Knowles had read the statement: "what am I to do or say, or how can I get out on examination, as I already said that it was heat that killed the cattle?"
A. He said that that was his opinion, that it was the heat that killed those cattle.
Dr. Knowles then said to him in reply "you can, after reading in books, easily change your mind or change your opinion." On the way down to Billings on the train before we got to Billings when I came to attend the trial Dr. Nutting addressed himself to me saying, "you had better sign that report."
Q. Did you say then "what report" and did he make no reply?
A. He did. I says "what report" and he says——

Mr. Reynolds: Wait a minute, you have answered the question, that is sufficient.

A. Yes sir.
Q. Now Doctor, assuming that an animal such as one of these had eaten at Cody, Wyoming, any indigestible food so that it started up an inflammation, causing later the death of the animal, what would you expect to find in cutting open the animal in reference to the condition of the bowels?
A. The small intestines by the time I held the post-mortem——
Q. Just say what you would expect to find in the way of evidence.
A. The bowels would be reddened and you would have your dark coloration showing through all three coats of the intestinal tract.

Cross-examination of F. Kesselring by Mr. Veazey:

I did not examine the intestines only for about a foot right at the end. I cut open I venture to say eight or ten feet of them at different places of the intestinal tract.
[fol. 231] Q. When Dr. Knowles called on you weren't the three of you, Dr. Nutting, Dr. Knowles and yourself, endeavoring as professional men to ascertain what was the probable cause of the death in this case?
A. We talked over the conditions. We did it as professional men.
Q. And at that time were you not bothered as to what was the cause of the death.
A. Well, I could not agree with the enteritis proposition in these cattle.
It is not true that at that time I said that as regards the intestines I had only opened the intestine right at the end for about a foot.
Q. And did you not give to Dr. Knowles additional symptoms that Dr. Nutting had not developed and was not Dr. Knowles trying to get together all of the symptoms so that he could make a diagnosis?

A. We talked over that, I do not know what all we talked about. I gave Dr. Knowles some of my reports as I testified.

Redirect examination of F. Kesselring by Mr. Enterline:

It would not be necessary under the conditions which you suggested to me if there had been enteritis to wash out the inner-bowel, or wash out the intestines for the purpose of observation; you could see it readily with the naked eye.

B. F. DAVIS, recalled as a witness for the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I have testified before on behalf of the plaintiffs. As to my experience in the observation of cattle eating salt sage in Wyoming, I will say that there is about ninety thousand square miles in Wyoming and I know of no part of the state—and I am familiar with every part of it—but what there is salt sage. I came to Wyoming as a field inspector for the Government in 1908. I have lived continuously in the state since that time with the exception of probably not to exceed two months.

Q. Then in all your experience Doctor did you ever know of any bad results of eating salt sage by cattle?

Mr. Reynolds: Objected to as not proper rebuttal.
By the Court: Overruled.

A. Never.

Assuming that an animal would eat, such as one of these, of some indigestible food as testified to on behalf of the defendant which would be sufficient to cause an irritation of the intestinal tract and thereby cause the death of the animal, either salt sage or any woody substance, anything that would create an irritation of the intestines, I would say that a post-mortem would disclose that to the naked eye, the condition of the bowel.

[fol. 232] Q. What would be the condition of the intestines?

A. Inflammation is the reaction of——

Mr. Veazey: Object to that as not rebuttal; that was gone into thoroughly in the plaintiff's case.
By the Court: Overruled.

Inflammation is the reaction of a tissue to an irritant. The first thing that takes place is the gathering of the blood at that part, when it becomes stagnant it becomes inflamed, or becomes inflammation, and when the intestine would be examined you would see the congested, advanced, inflamed condition of the bowel which is visible to the naked eye. That is the discoloration.

Cross-examination of B. F. Davis by Mr. Veazey:

That would show when I opened up the animal and looked at the intestine. It would show on the outer wall of the intestine. I will not concede that eating a woody substance would be apt to lead to indigestion. I would describe a woody substance, a food that is woody or fibre, as less digestible than hay or grass. If the animals when loaded on the train had nothing but this woody or fiber food and no hay or grass I would say that would be apt to lead to digestive disturbances.

If the digestive disturbances came on that would not necessarily be inclined to make the animal more easily affected by heat. I do not think it would be apt to make it more easily affected by heat. I do not think that if an animal made its meal wholly of a woody or fibrous plant instead of from grass or hay that that animal, if digestive disturbances did arise, would be able to withstand heat and moving around in a milling process of loading just as if it did not have this digestive disturbance. I do not thing it is true that if the food that an animal had before loading was not hay or grass but was a woody or fibrous substance heavier than hay and constituted a heavier food and therefore indigestion might arise, that that indigestion would be apt to cause the animal to be less able to withstand very hot weather. I do not feel that if the animal had indigestion in the morning before loading that it could be milled around and put on the cars and left standing in the cars while loading was going on and could be in transit during hot weather and not be affected at all by this substance that caused the indigestion. I believe the condition of indigestion would be aggravated, but it would not cause the animal to be overheated. The heat would aggravate the indigestion.

E. D. Nash, a witness recalled on behalf of the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I testified before on behalf of the plaintiff in this suit. I have not in my experience been around where salt sage is eaten by animals. [fol. 233] If an animal such as one of these in controversy in this suit had eaten some indigestible food before it had been loaded on the cars, an dthat indigestible food had caused an irritation of the intestines sufficient to later cause the death of a number of the animals in that consignment, a post-mortem would disclose the irritation on the intestines and it could be observed with the mere naked eye.

Cross-examination of E. D. Nash by Mr. Veazey:

As the animal was opened up and you looked in at the intestines as they lay there you might have to turn the intestines out on the ground or pull them out on the ground in order to expose it to the naked eye, but it would not be necessary to open them. No matter what was the progress of the digestive disturbance it would be visible to the naked eye if it was sufficient to kill. I have seen many cases of enteritis. I have seen a few but not many cases of heat stroke. I have probably seen heat stroke on two or three occasions prior to the occasion there at Great Falls.

ELMER C. GOULD, a witness called on behalf of the plaintiffs, being first duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

My name is Elmer C. Gould. I live at -owell, Wyoming. I am a veterinarian. I am a graduate of Kansas City Veterinary College in 1911. I occupy the office of Deputy State Veterinarian for the state of Wyoming. I have occupied that position ever since I graduated: I was appointed the next few days after I graduated. I went right into office. I am stationed at Basin and Powell, Wyoming. I was at Cody about six months. I have lived in Wyoming about thirty-two and one-half years. During that time I became acquainted with the range at the Pitchfork Ranch and from there to the Ninety-one Ranch and up to Cody, the conditions of the range there generally. I would say that I am very well acquainted with it: I used to be a cowboy there.

Q. Now then, is salt sage the only feed at one place there at Cody, or how do you say about it where Phelps has his range over at Pitchfork?

Mr. Reynolds: We object to that, Your Honor, as not proper rebuttal and matter gone into on direct examination.

By the Court: Overruled.

A. Well, there is salt sage more or less all over that country, not continuous but in spots all over.

I used to be a cowboy. I observed from time to time the cattle eating this salt sage. During all the experience I have had in the state of Wyoming I never knew of any bad results coming from cattle eating this salt sage. If an animal such as one of these in controversy in this suit before loading at Cody had eaten some in- [fol. 234] digestible food of any character sufficient to cause an irritation and afterwards cause the death of a number of animals in a consignment of nine hundred and eighty-four head, something like one hundred and fifty-five head, after they had been in transit from along about four o'clock of the sixteenth until about the eighteenth of July, a couple of days, and that irritation caused by eating some woody food had been sufficient to cause the death of the animals: in my opinion a post-mortem would disclose to the naked eye the inflammation, in other words a discoloration that you could discover by just the use of the naked eye on the intestines.

Cross-examination of Elmer C. Gould by Mr. Veasey:

I have never had a case of that sort such as has been directed to me, that is conditions of shipping and everything. I have had many cases of enteritis. I have never had occasion to examine animals that had fed on an ordinary grass range and not on salt sage and then were driven about forty miles and given a diet consisting particularly of nothing but salt sage upon arrival at destination. I did not say that there was salt sage all over the Phelps range; it is in spots practically all over that whole range, that whole country from Pitchfork to Cody, all over that entire Big Horn Basin. Animals will eat salt sage if they have other good food. They do not prefer the salt sage in the summer time; they prefer green grass if they can get it. When I say that the salt sage is found in spots throughout the Phelps range, of course that would apply more particularly to the lower part of the range, not so much up on the mountains, because salt sage does not grow up in the mountains you know; it don't grow farther up on the river, farther up in the mountains.

If the animals were in fact fed on grass and arrived at shipping point and then took a big fill of salt sage and their evening meal consisting of nothing but salt sage, I would not think that would be apt to create a digestive disturbance; I do not think that aside from its creating a digestive disturbance it would be apt to create a condition in the body of the animal that would make it less able to withstand the heat. I do not know the chemical analysis of the contents of salt sage. If an animal by some woody substance was made sick just as it was about to be cut out and loaded on the cars and it went through the milling process of cutting out and being loaded on the cars, its being sick might or might not affect its ability to withstand the heat, I could not say definitely as to that.

Q. You feel that if the animal was sick that it would be only remote that it would be affected by heat?

A. Well, that I could not say definitely.

[fol. 235] WILLIAM B. WRIGHT, recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I know this witness Minugh that testified on behalf of the defendant. I have met him. I have gone with him where I had cattle for the Galbraeth Cattle Company in a shipment that he was making between western points and Chicago.

Q. At what point did you get in on the train where he was on?

Mr. Reynolds: We object to that, Your Honor, as not rebuttal. There was no testimony regarding any such shipment.

By the Court: I do not know what counsel is leading up to. Overruled.

A. At New Brighton, Minnesota.

From New Brighton, Minnesota, we went to Chicago. If I remember correctly Mr. Minugh had in that shipment at that time fifty-two cars, it was right around fifty cars. Mr. Minugh was in charge of the fifty-two cars. He did not have anybody else with him. He and I were the only caretakers on the train. My outfit had five cars in that train. On another occasion in 1920 I went with him. There was another shipment that I joined. I got in with him at New Rockford, North Dakota, at that time. We were going to Chicago.

Q. And how many cars did Mr. Minugh have charge of in that consignment?

Mr. Reynolds: I object to that as not rebuttal. If it is intended as impeaching testimony no proper foundation has been laid. Mr. Minugh has been interrogated about none of these things at all.

By the Court: The only place where I could see where it might be rebuttal is in the testimony of this man Minugh that there must be two experienced caretakers. Overruled.

(Question read.)

A. I do not remember, it was around thirty though, and I had twelve. There was no one with Mr. Minugh at that time. There were other caretakers in the train. It was in 1909 when there were fifty-five cars.

With reference to the testimony given by yard master Newcomb, I never, to Newcomb or anyone else at Judith Gap, objected to my cattle being taken off of the train. That was the first time I ever went over the road there. I did not know anything on that trip about any of the watering facilities of the company. I knew nothing of that road at all.

Cross-examination of William B. Wright by Mr. Veazey:

The first time that I had cars with Mr. Minugh was in 1909 at New Brighton, Minnesota. If I remember correctly it was August, it was either August or September. He had in the neighborhood of fifty cars, and if I remember right it was fifty-two, but I would not [fol. 236] be certain of that. Mr. Minugh and I were the only caretakers on the entire train. There were no other persons on the train that I know of except the train crew. Mr. Minugh and the train crew and myself were in the caboose. That would be the conductor, rear brakeman, myself and Mr. Minugh, and at times the head brakeman. I rode the train from New Brighton to Chicago. Since 1917 I have acquired considerable experience in the handling of livestock. I did not state that those fifty-two cars belonged to Mr. Minugh. He was in charge of these cars for the Matador Cattle Company. I do not know that they belonged to the Matador Cattle Company. I simply assumed the fact from Mr. Minugh's conversation. He said he was the shipper for the Matador Cattle Company. I base the statement that those cattle were owned by the Matador Cattle Company on the statement of Mr. Minugh that they belonged to the Matador Cattle Company and that he was the shipper.

Ned Sales, recalled as a witness for the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I have testified before on behalf of the plaintiffs. I have been around the Pitchfork Ranch about fifteen or sixteen years. That has been the last fifteen or sixteen years. I am acquainted with the range conditions there and as to the salt sage along from the drive that I made on this occasion when these cattle were loaded.

Q. You may tell the jury whether or not there is any salt sage around the Pitchfork range?

Mr. Veazey: We object to that, your Honor, as not rebuttal, gone into with this witness on direct examination.
By the Court: Overruled.
Mr. Veazey: Let the record show that Mr. Kent and Mr. Hill were excused by the defendant and are not here so that we can meet this testimony.

(Question read.)

A. Yes sir.
Q. Now, directing your attention Ned to up there at the Cody Canal where the cattle were held the night before they were shipped, what was the character of the feed there?

Mr. Reynolds: Object to that as not proper rebuttal and gone into by this witness on direct examination.
By the Court: The objection is sustained.

The cattle ranged over approximately forty to sixty acres there.
Q. Now, directing your attention Ned to when the cattle were loaded, did you say to Lentz, or did Lentz say to you "the cars are being overloaded" and did you say, "shove them into the cars" or "shove them in?"

[fol. 237] Mr. Reynolds: Object to that as not proper rebuttal. This witness was asked that question on direct case.
By the Court: Overruled.

Q. Did you make that statement?
A. No sir.
I had helped load cattle before that for the Phelps outfit. I generally put in a thirty-six foot car of three-year-olds anywhere from twenty-six to twenty-eight head of cattle.

Mr. Enterline: There is no controversy about the yearlings is there, that that was overloaded?
Mr. Veazey: No.

Cross-examination of Ned Sales by Mr. Veazey:

I am still in Mr. Phelps' employ. I was employed in 1917 in July at working with cattle as foreman. I was not his ranch foreman. I was his cattle foreman. I was holding a position looking after the cattle. I was holding a position which I call cattle foreman. The position I am holding now is practically the same, working with cattle and sheep both. I could not say as to whether Mr. Cassidy is now their cattle foreman—at any rate I am not now their cattle foreman. The character of the country there through which the animals were driven was not mountainous country as far as Sage Creek and east of Sage Creek.

Q. Where do the mountains start? Do they start at Cody or do they stort at Sage Creek or where?

A. The mountains start—go plumb around the basin.

They go clean around the basin. On the drive from Pitchfork to Cody we did not come through the mountains from Pitchfork to Cody.

When we went to pick up the cattle they were not then ranging in the mountains, or around the foot hills, and the cattle were not in the mountains. Salt sage grows in the foot hills. As to whether it grows at the place where these animals were grazing before they were rounded up, I would say it is in patches all over that range. Aside from the place where the animals were finally rounded up into a herd there was salt sage on the range where the animals were grazing before the rounding up began, where they wintered, some. That is not mountainous country, it is just ravines and then flats the same as any country.

Redirect examination of Ned Sales by Mr. Enterline:

Q. I think the witness Hill testified that you told them to take slickers and rush the cattle, or drive them. Did you do that Ned?

A. No sir.

Mr. Veazey: Wait a minute. I object to that as not proper rebuttal. He was asked on cross-examination in the direct case regarding that.

By the Court: Overruled.

[fol. 238] There was no occasion for me to make a hurried drive and I did not.

L. G. Phelps, recalled as a witness for the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

With reference to the range where these cattle were running before they were shipped, there is salt sage there where they had been grazing. I have had about twenty years' experience in running cattle where there is salt sage. In all my experience I never had any difficulty or any bad results or serious results or any bad results from the cattle eating salt sage.

There was some testimony about my ordering cars, ordering some thirty-six cars. At the time I ordered the cars I did not specify any length of the cars. Thirty-six foot cars are not the only cars that are used in the transportation of livestock. A thirty-four foot car is not a common car, but a car that comes in many a lot of cars offered the shipper for his use. At the time I ordered the cars I was figuring on shipping around a thousand head of cattle.

Q. Now then, directing your attention to the alleged overloading of the animals, take the three-year-olds, which I understand are the only ones in controversy here Mr. Phelps, as to the overloading. What is the ordinary number loaded, say in summer or in winter, as to the number of head of three-year-olds in a car?

A. From twenty-six, if they were full three-year-olds, to twenty-nine. If they were of assorted ages, more.

Mr. Veazey: We object to this on the ground that this was gone into in plaintiffs' case in chief very fully. Three, several witnesses testified to that.

By the Court: Overruled.

I spoke of the full three-year-olds. These would be full three-year-olds in the month of July, 1917. With reference to the number of caretakers to a shipment of thirty-two cars and such a shipment as is here involved, going between the points involved, or between any points, one caretaker was plently and as good as fifty.

With reference to the place there at Cody where these animals grazed the night before they were loaded, I have held cattle there a great many times in all the years, and several times that year.

Q. Do you remember Mr. Ryan making a shipment about that time or later?

A. His shipment followed this shipment.

Mr. Reynolds: Just a minute, please. Answer the question yes or no.

A. Yes sir.

That was after this shipment. The character of the cattle which he shipped where fat cattle out of my own herd. With reference to the place where these cattle were held the night before loading, the vege- [fol. 239] tation there of salt sage is very scant. I am not prepared to estimate in pounds how much there would be per acre, as I cannot tell the amount of feed there is on a stubby bush of salt sage, but I would say that there was not enough to make a third of a so-called fill of an animal.

The fill of an animal is twenty to twenty-five pounds. That would be a day's feed.

Q. Now, was the range at that time there at that particular point restricted to salt sage, or was there any grass at that time?

A. There could be grass as well as salt sage, as the common——

Mr. Veazey: I think that is argumentative.

By the Court: The question was, what was it.

Q. Yes, if you know Mr. Phelps?

A. I know there was a second crop of grass and a second crop of sage.

Cross-examination of L. G. Phelps by Mr. Veazey:

If the animals arrived at Cody, that is at the Cody Canal, between two and four in the afternoon and were watered between four and seven prior to loading, they had no fill of feed except this second grass and this salt sage, and except what they nibbled coming in from the bed ground of the night before, which would be at Sage Creek.

Q. Would they do much nibbling as they came in, close herded from Sage Creek, on the drive from Sage Creek to the Cody Canal?

A. Oh, they couldn't be close herded.

I say they could not be close herded. I was not there with them. They could not be close herded because driving twelve miles in some twelve hours it would be impossible for them to have been close herded and drive steadily, they would have arrived at their destination long before they did.

Q. And you feel that in that drive of twelve miles in hot weather that they would pick up how much grass on the way?

A. Could have picked up grass if they had been hungry, if there was any to pick up, yes sir.

I myself directed that Mr. Wright should be sent in charge of this shipment. At that time I knew that he had had absolutely no previous experience in the handling of a livestock train, but he had a lot of intelligence. I understand that there are thirty-four foot cars; they may not be thirty-four but they are less than thirty-six foot cars, because I have them not infrequently on the Burlington railroad. I ordered thirty-six cars, as I always order ample cars for my proposed shipments. I did not intend to load thirty-six cars or thirty-two cars, I intended to load in the proportion of cattle to cars as I did load and had a definite number of cattle to come when I started, I did not know whether there would be ten hundred and twenty or nine hundred and eighty, but the delivery was to be approximately a thousand.

Q. What arrangements had you made with the Burlington and [fol. 240] with your foreman as regards the time that you would leave—that you would make delivery to the Great Northern?

Mr. Enterline: That is objected to as improper cross-examination.

By the Court: The objection is sustained.

Redirect examination of L. G. Phelps by Mr. Enterline:

We consider this salt sage that has been spoken of in a different class from sage brush in our country. There are kinds of sage as well as sage brush. I consider salt sage as a creepy sage, a sage close to the ground, softer in its texture, and there is a brown sage as well in our county, and as salt sage is known and as I know it the less fibrous sage is the salt sage. The cattle ordinarily eat the softer growing sage.

RUSSELL THORPE, a witness called on behalf of the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I have testified before on behalf of the plaintiffs. I also testified that I have shipped cattle from time to time.

Q. Now, take a shipment of thirty-two cars, in the way of the number of caretakers how many go along with a shipment of that kind?

Mr. Reynolds: Object to that as not proper rebuttal, having been gone into on cross-examination of this witness in chief.

By the Court: Overruled. I do not know for sure whether the witness testified to it or not, if he did it would be only repetition.

Q. How many?

A. I usually send one man with a shipment.

I have been in that business twenty to twenty-five years.

Q. Now, in the way of loading and number of animals in a car, take the three-year-olds which I understand are the only ones in controversy here, how many should be loaded in a thirty-six foot car of three-year-olds?

Mr. Reynolds: Object to that for the reason it was gone into on cross-examination in direct case.

By the Court: Overruled.

A. Up to thirty head.

I would say that could be done in the month of July, depending on the condition of the cattle. Taking these cattle, for instance, and assuming that they were in good condition when they were loaded, I would load them up to twenty-eight head. I have had some experience with salt sage on the range in Wyoming. I have had practically a lifetime experience in Wyoming. I never knew in all my experience of any bad results from cattle eating salt sage.

No cross-examination.

[fol. 241] E. B. Ryan, a witness recalled on behalf of the plaintiffs, having been previously duly sworn, upon direct examination by Mr. Enterline testified in rebuttal as follows:

I have testified before on behalf of the plaintiffs. I made a shipment seven or eight weeks after this shipment was made of cattle from the Phelps ranch. It was still during hot weather; it was warm. I shipped the fat cows out of the Pitchfork herd. They were loaded at Cody and part of them went to Chicago and part of them to Iowa.

Q. And directing your attention to how many animals of those three-year-olds would you say could be safely loaded in a car——

Mr. Reynolds: We object to that as not proper rebuttal.

By the Court: Does the question pertain to the shipment that he made?

Mr. Enterline: No, I am asking generally, and then I am going to show that he shipped more in his.

(Question read.)

Q. A thirty-six foot car, the number in the month of July, 1917?
A. I would load twenty-seven or twenty-eight head of the three-year-old Pitchfork steers.
Q. How many did you load of your cattle in the cars?

Mr. Reynolds: We object to that, Your Honor, as incompetent, irrelevant and immaterial, not proper rebuttal, the circumstances not being the same.
By the Court: Sustained.

In a cattle shipment of thirty-two cars they only need one caretaker. I have had some experience around where cattle eat salt sage. One year I wintered five thousand steers on the Red Desert west of Rawlins, Wyoming, and that is practically all salt sage; that is an entire salt sage country.

Q. Did you have any bad results, or do you know of any, from cattle eating salt sage?
A. We lost one of those.

No cross-examination.
Plaintiff rests.

Mr. Veazey: The Great Northern contract (Exhibit 2) is offered also for the purpose of showing the duties of a caretaker and the measure of care required by the railway company in a suit against this defendant.

WILLIAM B. WRIGHT, a witness called on behalf of the defendant, having been previously duly sworn, upon direct examination by Mr. Veazey testified in sur-rebuttal as follows:

In November of last year I was in the employ of Mr. Thorpe, or the Galbraeth Cattle Company. At that time I was served with a [fol. 242] subpœna by the railway company requiring me to give my deposition, and my deposition was taken.
Q. Was the Pitchfork Ranch and the range where these cattle were held mountain country or otherwise?

Mr. Enterline: Object to that as improper cross-examination.
Mr. Veazey: That is not cross-examination. I am calling him as my witness at this time.
By the Court: Well, let him answer the question.

A. Are you questioning me on my deposition Mr. Veazey?

By the Court: Well just answer the question.

Q. Didn't you testify in the deposition as follows, page six:

"Q. When did you first see the cattle that are involved in this lawsuit?
"A. Approximately at the time of my entering into the employment of Mr. Phelps.
"Q. Where were they then?
"A. At that time they were on the range on Mr. Phelps' ranch.
"Q. That is on the ranch near Pitchfork?
"A. Yes. His range surrounds Pitchfork you might say.
"Q. About how many acres are there, including his range?
"A. My guess would be very broad. I don't know. I should say a range I guess perhaps of two thousand acres."

Now, over to page seven, about half way down the page.

"Q. As regards the water where the ranch was, the ranch was up in the mountains, was it not?
"A. Yes sir."
and this——

"Q. Did the cattle get any alkali in any stream at which they watered from the Ninety-one Ranch up to but before being watered at the Cody camp?
"A. Not that I know of.
"Q. That was good clear mountain water up to that time?
"A. It was good clear mountain water up to that time, yes.
"Q. And the feed you would characterize as cured grass, as hard feed?
"A. Yes sir.
"Q. They were fed in the course of this drive from the Ninety-one Ranch and the range where they had been up to Cody?
"A. Yes sir.
"Q. What was the feed at Cody?
"A. On the ditch?
"Q. Yes, the same kind of hard grass feed?
"A. Grass and salt sage.
"Q. The same kind of cured grass?
[fol. 243] "A. Yes sir.
"Q. And salt sage?
"A. Yes sir.
"Q. There was no salt sage back in the mountains?
"A. No sir."

Mr. Enterline: We object to that as not sur-rebuttal and incompetent, irrelevant and immaterial.
Mr. Veazey: The purpose of this is to show new invention on the part of the plaintiffs.
By the Court: As I understand it now you are questioning this man as your own witness?
Mr. Enterline: I also object to it as an improper method of examining a witness, to read from a deposition.
Mr. Veazey: I am proving that this man while in Thorpe's em-

ploy and acquainted with the facts made this statement, and the plaintiffs are now changing their theory.

Mr. Enterline: We are perfectly willing to introduce the entire deposition to the jury and not take the portion out of it.

By the Court: The objection is sustained.

By the Court: Let the record show that the Court now sustains the objection to exhibit No. 2 offered by the defendant.

Mr. Veazey: To which ruling of the Court the defendant excepts on the ground that said contract is admiss*a*ble to define the obligations of the railway company in the transit and the duties of the caretaker, and this suit is against the defendant not as initial carrier under the Interstate Commerce Act, but at common law as an intermediate carrier for its own use only.

(Here Clerk will insert Defendant's Exhibit No. 2.)

Defendant rests.
Plaintiff rests.

Settlement of Instructions

Plaintiff's Requested Instructions

Without the presence of the jury, and in the presence of counsel for plaintiffs and defendant, the Court proceeded to settle the instructions in the case as follows:

Plaintiffs offer instructions numbered one to fifteen inclusive.

Plaintiff's Offered Instruction No. 1

You are instructed that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing what such a person under the existing circumstances would not have done.

Mr. Veazey: The defendant objects to No. 1 on the ground that it imposes no certain standard upon the jury as to what is negligence, [fol. 244] in that it defines negligence as doing for instance what a reasonable person would ordinarily have done. The measure of duty is not what some or a reasonable and prudent person would have done, but what the average reasonable and prudent person would ordinarily have done, or doing what such a person would ordinarily not have done.

By the Court: Overruled. No. 1 will be given.

Exception.

Plaintiffs' Offered Instruction No. 2

You are instructed that it is not incumbent upon the plaintiffs to prove each and every act of negligence set forth in their couplaint to entitle them to recover damages against the defendant. It is sufficient if they prove by a preponderance of the evidence one or more of the acts of negligence set forth in their complaint and the damages resulting from such act or acts of negligence.

Mr. Veazey: The defendant objects to that on the ground that it authorizes a recovery without qualification as to the rule of contributory negligence. It advises the jury that the plaintiff can recover if he proves that the defendant was negligent and if damages resulted therefrom, irrespective of whether the shipper's own negligence contributed to the same. There should be added to the instructions, in any event, the words "subject to the rule of contributory negligence."

By the Court: Overruled.

Exception.

Plaintiffs' Offered Instruction No. 3

You are instructed that the burden of proof is on the defendant to show negligence, if any, on the part of the plaintiffs' caretaker who was in charge of the said cattle in respect to the manner of looking after the same while being transported by the defendant.

Mr. Veazey: The defendant objects to said instruction on the ground that in this kind of case where the damages are due to inherent character of the animals the burden of proof is on the plaintiffs to show that it was caused by the negligence of the defendant and not by any failure on the part of the shipper.

By the Court: Overruled.

Exception.

Plaintiffs' Offered Instruction No. 4. (Withdrawn)

Plaintiffs' Offered Instruction No. 5

You are instructed that where animals are delivered to a common carrier for transportation and are injured during transportation and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has [fol. 245] the burden of proving that the injuries were occasioned by some other cause than its own negligence, tho the shipper accompanies the shipment.

Mr. Veazey: The defendant objects to that instruction on the ground that in this kind of case, especially where the shipper's agent accompanies the shipment and where the delivery is made to the defendant not as the initial carrier but as an intermedite carrier, the burden is upon the plaintiffs to show that the animals were in good shipping condition to stand an ordinary transit at the time the defendant received them at Mossmain, while under these instructions if the animals were delivered to the Burlington as a common carrier and were injured during the transportation from Cody, the burden of proof would be placed on the defendant in this case to show that any overheating or other condition of the animals occurred prior to Cody. The defendant further objects to said instruction on the ground that it is not applicable to this kind of case, for the issue here is not the liability of the initial carrier, and the question in this case is whether the an-mals were in good shipping condition at the time they were received at Mossmain, and the burden of proof is on the plaintiffs to show that they were in good shipping condition at that time, while this instruction is contrary thereto and this instruction is not applicable to this case in that under the issues in the case the question is whether the animals were injured by want of vitality, and the proof of both parties is to the effect that they were injured by want of vitality.

By the Court: Let the record show that offered instruction No. 5 is modified by the Court by striking out the words "where animals are" in line one and inserting in lieu thereof the words "if you find that the cattle in question were" and by striking out the words "a common carrier" in line two and inserting in lieu thereof the words "the defendant in good condition."

Mr. Veazey: The defendant objects to that for the reasons heretofore stated, and for the further reasons that the instruction is confusing to the jury and would lead the jury to believe that the burden of proving the good condition of the animals at the time they were received by the defendant rested upon the defendant, and the jury should be instructed that the burden of proof is on the plaintiffs to show that at the time the animals were tendered to the defendant at Mossmain they were then in sufficient shipping condition to stand the transit proposed, and that none of the damages sustained in transit for which recovery can be allowed was due or caused by any want of vitality or any bad condition of the animals at the time of delivery at Mossmain. This instruction is contrary to this rule with regard to burden of proof.

By the Court: Overruled.

Mr. Veazey: May I add to that also that this instruction would place the burden of proof upon the defendant in the alleged matter of beating the animals, and as regards other acts set forth in the evidence and charged in the pleadings, although the plaintiff was present and was the caretaker in charge of the shipment, and in the reloading process was in itself reloading the stock, and by this in- [fol. 246] struction as regards damages caused by the plaintiffs' own acts in loading and reloading, especially in the matter of any beating, the burden of proof is placed on the defendant to disprove this, whereas under the law the burden of proof is on the plaintiffs to show that what acts were done and were the cause of the damage. The instruction is also inapplicable to this case because the whole issue in this case is whether the injuries were due to or caused by the inherent want of vitality of the animals at the time they were received, and whether they were then able to withstand the ordinary incident of the transit. And this instruction confuses the jury into believing that the burden of proving the good condition of the animals is on the defendant.

By the Court: The offered instruction No. 5 will be further modified by the Court by inserting after the word "injuries" and before the word "were" in line six the words "other than the alleged beating of the said cattle," and the objection of the defendant will be overruled.

Mr. Veazey: These objections are now made to the instructions as now modified.

By the Court: Overruled, and the instruction will be given.

Exception.

Plaintiffs' Offered Instruction No. 5 as Modified by the Court.

You are instructed that if you find the cattle in question were delivered to the defendant in good condition for transportation and are injured during transportation and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries other than the alleged beating of said cattle were occasioned by some other cause than its own negligence, tho the shipper accompanies the shipment.

Plaintiffs' Offered Instruction No. 6 (Withdrawn)

Plaintiff's Offered Instruction No. 7 (Withdrawn)

Plaintiffs' Offered Instruction No. 8

You are instructed that the undisputed evidence in this case discloses that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same and that plaintiffs compensated the defendant for the feeding thereof. It was therefore the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed, and water the same during the time the cattle were at Great Falls, Montana.

[fol. 247] Mr. Veazey: The defendant objects to that on the ground that it is an erroneous statement of the evidence, and the proof does not show that the defendant undertook to unload or did unload the cattle, but that the defendant's employes merely assisted the caretaker in his duty to attend to the matter of unloading, watering, feeding and caring for the animals, and that bills were not tendered to the plaintiffs or paid by the plaintiffs for any work done by defendant's employes in the premises in assisting the caretaker. The bills were merely for feed which the defendant procured for the shipper. Under the law it is not the duly of the defendant to unload the cattle or to properly feed or water the same, or take care of them while they are in the feed yards at Great Falls, but on the contrary this is a duty resting upon the shipper and his caretaker, and the defendant cannot be held liable if the animals simply were not properly unloaded or fed or watered, but can be held liable at most only for the defendant's own neglects in this particular, and in this regard while the employes are engaged in unloading as assistants of the caretaker and they become employes of the caretaker; and further the error in this instruction presents the error in excluding the livestock shipping contract signed at Mossmain. Further under this instruction, though an incompetent caretaker was sent in charge of the shipment and the employes of the defendant assisted him in discharging his duty to unload the animals, and the animals were damaged by reason of his failure to instruct them as to how they should unload the animals, or how they should be rested, or how they should be cared for, or the animals were injured by reason of his failure to give directions as regards feed, the defendant would be held liable though it was not in fact negligent. Under the law railroad employes are not expert cattle men and the caretaker is supposed to be, and the duty of determining what should be done and of seeing to it that the animals are properly unloaded and cared for rests upon the shipper and not upon the railway company.

Mr. Enterline: In the first line strike out the words "the undisputed" and insert the words "if you find from the" and on line two strike out the words "discloses." On line five, after the word "thereof" insert the word "then' and strike out the word "therefore." And we offered it as so amended.

By the Court: Let the record show that the objection to No. 8 is sustained, and the plaintiffs reoffer it as modified.

Mr. Veazey: The defendant makes the same objection to this instruction as modified as was made to it in the first place, and on the further ground that the duty of caring for the animals and loading and unloading them at Great Falls rests upon the shipper, and the defendant's employes are mere assistants to the shipper, and this instruction would make the defendant liable even if it were merely assisting the shipper and complying with the shipper's directions as to what should be done, or even if the defendant was, by railroad men not experienced in such matters, exercising its best judgment as to what should be done, though the caretaker was present and approving what was done. This instruction also makes the defendant an [fol. 248] insurer that the animals will be properly fed, watered and care for, whereas the defendant at most would be bould only to exercise reasonable care in the premises and in fact only to furnish men to act under direction of the shipper. The caretaker is here on the ground, and this instruction as framed would make the railway company liable even if he was on the ground and directing what should be done, or they were assuming that in the absence of direction by him that they were doing the right thing.

It would make the railway company liable even if they were going ahead with a caretaker looking on and giving no instructions at all: it would assume that the caretaker was approving what they were doing. Where the caretaker is present with the stock and on the ground the burden rests upon him to look after the unloading, and the railway company cannot be held liable if the unloading is not done properly, even though part of that is caused by the negligence of the caretaker himself in not giving directions. There should be added to the instruction certainly "except insofar as the improper loading, watering, feeding or otherwise caring for the cattle, if any, was contributed to by the carelessness of the caretaker." This is peculiarly a case where the rule of contributory negligence should not be covered by a general instruction, but should certainly be inserted by reference in this instruction. The instruction should have added after it in any event "but the defendant is not liable for any damages in the matter of feeding, loading, unloading or otherwise caring for the animals at Great Falls to which any negligence of the caretaker contributed."

By the Court: Overruled. No. 8 will be given as modified.

Exception.

Plaintiffs' Offered Instruction No. 8 as Modified

You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same and that plaintiffs compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a human manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed, and water the same during the time the cattle were at Great Falls, Montana.

Plaintiffs' Offered Instruction No. 9 (Withdrawn)

Plaintiffs' Offered Instruction No. 10

You are instructed that the plaintiffs are not bound by the value fixed in the bill of lading or the live stock contract introduced in evidence, and if you find for the plaintiffs then the plaintiffs are entitled to recover the fair market value of the cattle that died, namely 155 head and for the depreciation in value, if any, of the remaining 829 head, as definded in these instructions.

[fol. 249] Mr. Veazey: We object to this instruction for the reason that it advises the jury that if they find for the plaintiffs in any event they must find for the plaintiffs for the full value of 155 head, though the evidence would not show that any that died, or what number that did die, died by reason of any negligence of the defendant. It authorizes a direction to the jury that if they find for the plaintiffs they must find for the full value of all the animals that died, and for the full depreciation, if any, in the remainder of the herd, even though such deaths and such depreciation was not caused by the negligence of the defendant. Morever, the evidence does not show that 155 head died, or that the defendant is liable for the death of 155 head. The instruction is clearly erroneous and amounts practically to an instruction that if they find for the plaintiffs at all they must find for the full amount of the death and full amount of the depreciation, irrespective of what caused the death or the depreciation. There ought to also be the objection that this is the liability of an intermediate carrier and not of an initial carrier, and under the livestock contract the valuation fixed therein would be valid in favor of an intermediate carrier when the suit is directly against it.

Mr. Enterline: I would modify No. 10 by striking out all that follows after the word "evidence" in line three, and offer it as thus modified.

By the Court: Let the record show that No. 10 offered by the plaintiffs is modified by striking out all after the word "evidence" in line three of the instructions, and the instructions given as modified.

Mr. Veazey: We make the same objection to the instruction as modified.

By the Court: Overruled.

Exception.

Plaintiffs' Offered Instruction No. 10 as Modified

You are instructed that the plaintiffs are not bound by the value fixed in the bill of lading or the live stock contract introduced in evidence.

Plaintiffs' Offered Instruction No. 11

You are instructed that if you find for the plaintiffs and should find that the loss of and injuries to the cattle were occasioned by the negligence of the defendant then you should award the plaintiffs damages as follows: (a) The fair market value at Seville, Montana, of the 155 head of cattle in the condition in which such 155 head would have arrived at Seville, Montana, on or about the 18th day of July, 1917, had they not been injured and died by reason of the negligence of the defendant. (b) The difference between the fair market value of the remaining 829 head of cattle at Seville, Montana, in the condition in which they would have arrived at Seville, Montana, on or about the 18th day of July, 1917, but for the negligence of the defendant and the fair market value at said time and [fol. 250] place in the condition in which they did arrive. And from the total sum of damages allowed on said cattle you will deduct the freight charges of $2,721.48.

And if you should further find from the evidence that the plaintiffs are compelled to lay out and expend any money for feed and care of the cattle at Great Falls, Montana, by reason of any negligence proven against the defendant then you should allow the plaintiffssuch reasonable expense as shown by the evidence that they incurred and add the same to the damages hereinbefore mentioned.

Mr. Veazey: This instruction is objected to upon the ground that it assumes not only that there was a loss of animals but it assumes that there were injuries to the balance of the herd, and that it assumes that 155 head of cattle were lost to the plaintiffs by reason of the negligence of the defendant, whereas the proof shows that some animals were left at Great Falls in charge of the plaintiffs' veterinarian, but what became thereof is not shown, and it assumes that 155 head died by reason of the negligence of the defendant, whereas that is not the fact. The instruction also assumes that the defendant was negligent, and it submits to the jury only the issue as to the value of the 155 head and the damage to the remainder. This instruction amounts to a direction in its exact language that the plaintiffs, if entitled to recover at all, are entitled to recover the value of the entire 155 head referred to, and the depreciation referred to, or nothing. It, in fact, in its language comments upon the evidence, and states that the defendant was negligent and that this negligence cause the death of the 155 head and the depreciation and that the only issue is whether the plaintiff is entitled to recover for all of the 155 head and the depreciation, or nothing. The instruction also assumes that the balance of the herd depreciated, and constitutes a comment upon the evidence in this particular The effect of the instruction is that the jury is told that if they find for the plaintiffs they must find for the full value of the deads and the depreciation, whether or not a part of the deaths or depreciation was not caused by negligence of the defendant in any particular. In other words, if the defendant was negligent in any single particular during any of the trip or at any place and though the damages resulting therefrom would be slight, under this instruction the jury is directed to find for the entire value of the deads and for the depreciation, or nothing; this too irrespective of whether or not any of the defendant's specified acts of negligence caused the damage or not, or whether the plaintiff's negligence contributed thereto. In this kind of case where the transit is a long one and new acts of negligence may come in at any time, it is peculiarly necessary to charge the jury that the issue is not whether the value of the entire deads may be recovered and of the entire depreciation or nothing, but only of that part th-reof which some specific act of negligence of the defendant caused.

By the Court: Overruled. No. 11 will be given.

Exception.

[fol. 251] Plaintiffs' Offered Instruction No. 12 (Withdrawn)

Plaintiffs' Offered Instruction No. 13 (Withdrawn)

Plaintiffs' Offered Instruction No. 14

You are instructed that if you find in favor of the plaintiffs you may allow them interest upon the damages which you find that they have sustained at the rate of eight per cent (8%) per annum from the 18th day of July, 1917, to this date.

Mr. Veazey: We object to that instruction on the ground that interest is not demanded in the complaint as an item of damages, and therefore neither party was authorized to introduce proof upon which the jury could exercise their discretion in the matter of interest. Neither party would be allowed under the pleadings to introduce proof as to what was the cause of the claim not being presented earlier, or of the suit not being filed earlier, or of not being brought earlier to trial; and this, if interest is in the discretion of the jury, it not being pleaded, the defendant was not permitted to introduce facts moving the jury to exercise discretion. Further, if interest is in the discretion of the jury, it is not necessarily at the rate of eight per cent, but any such sum as the jury in its discretion might allow; next, that in this kind of action interest is not recoverable in any event, and lastly, if interest is recoverable it would be recoverable only if pleaded and would rest only in the discretion of the jury, both as to the rate of interest and the time for which it should be allowed, and no facts have been presented to the jury upon which they would be justified in exercising any discretion in the premises.

By the Court: Overruled. No. 13 will be given.

Exception.

Mr. Veazey: Could it be added after the instruction "interest is in your discretion?"

By the Court: I think I will leave it just as it is.

Exception.

Plaintiffs' Offered Instruction No. 15

You are instructed that this being a civil action two-thirds of your number, that is eight of you, can agree upon a verdict, and when eight, or more, of you agree upon a verdict such verdict will be signed by your foreman and returned into Court.

Mr. Veazey: No objection.

By the Court: No. 15 is given without objection.

[fol. 252] DEFENDANT'S REQUESTED INSTRUCTIONS

Defendant offers instructions numbered one to twenty-nine inclusive.

Defendant's Offered Instruction No. 1

You are instructed that the burden rests upon the plaintiff to prove the essential elements of their complaint by a fair preponderance of the proofs and that therefore in this case, plaintiffs must establish by such preponderance of proof not only that the defendant was negligent but also that such negligence, if any, was the direct and proximate cause of plaintiffs' damage, if any.

Mr. Enterline: No objection.
By the Court: No. 1 is given without objection.

Defendant's Offered Instruction No. 2

You are instructed that by the burden of proof as to any issue is meant that the party upon which rests the burden of proving such issue, must establish the same by a preponderance of the evidence. If therefore, in your deliberations, your minds are evenly balanced as to any issue and you cannot make up your minds as to such issue one way or the other, then the party upon whom rests the burden of proving that issue has not established the same.

Mr. Enterline: No objection.
By the Court: No. 2 is given as requested.

Defendant's Offered Instruction No. 3

Unless you find from the evidence that defendant company was guilty of negligence in the handling of the stock in question, you cannot render any verdict in favor of the plaintiff.

Mr. Enterline: No objection.
By the Court: Given as requested.

Defendant's Offered Instruction No. 4

You are instructed that defendant is not liable for damages to plaint-ffs merely because the cattle in question suffered or some of them died, unless it further appears that such sufferings or deaths were due to the sole negligence of defendant.

Mr. Enterline: No objection.
By the Court: No. 4 is given as requested.

Defendant's Offered Instruction No. 5

You are instructed that negligence is defined to be the failure to exercise the ordinary and reasonable care that the ordinarily [fol. 253] prudent man will exercise under the circumstances of the particular case.

Mr. Enteline: That is objected to because it is covered by another instruction; it is merely repetition.
By the Court: No. 5 is refused as covered.

Exception.

Defendant's Offered Instruction No. 6

If you find from the evidence that defendant had advices from the Burlington that the stock in question would be delivered at Mossmain at 4 P. M. and accordingly defendant made arrangements to make a connection out of Mossmain for *for* them based upon said advices and was then advised that said shipment would not arrive until 10 P. M., defendant was not required to hold the engine or crew longer, but was entitled to use the same for other freight and any delay on the part of the defendant, which could be negligence on its part would begin not earlier than the time when the next available crew or correction was available.

Mr. Enterline: That is objected to because they might be guilty of negligence in holding them there at Mossmain while in the care of the company.

By the Court: I will refuse the instruction as it stands, and if you wasnt to submit an instruction in the place of it you may do so. The instruction as it stands will be refused.

Exception.

Defendant's Offered Instruction No. 7

If you find the evidence that the delay at Mossmain did not cause any undue heating of the cattle in question and that the run from Mossmain to Great Falls was made in the ordinary and usual time for transportation of trains of livestock between such points and that there were no stops of unusual length between said points, then you cannot in this case render any verdict in favor of the plaintiffs for the death of or damages to any of the cattle in question by reason of heat prostration.

Mr. Enterline: That is objected to for the reason that he uses the word "undue" heating of the cattle, and for the further reason that the defendant company is obliged to exercise ordinary care and transport the cattle with reasonable dispatch and exercise due diligence in so doing, and if it fails to do that then it is liable and the defendant company cannot rely upon any schedule or upon the defense that the stops were not unusual, but under the law is compelled as hereinbefore stated to exercise ordinary care in transporting the cattle and to transport the same with due diligence.

By the Court: The objection is sustained. No. 7 will be refused.

[fol. 254] Mr. Veazey: The defendant re-offers instruction No. 7 by striking out the word "undue" in line two.

Mr. Enterline: We urge the same objections that we urged before, that the question to be submitted to the jury is one of ordinary care and due diligence, and the defendant company in this case was obliged to exercise ordinary care in transporting cattle, and to use due diligence in transporting them with reasonable dispatch

By the Court: The objection will be sustained, the offer will be refused.

Exception.

Defendant's Offered Instruction No. 8

Even though you should find from the evidence that defendant was guilty of negligence in the handling of the shipment in question, yet if you further find that such negligence was not the cause of the injury or death of the cattle in question, then your verdict must be in favor of the defendant.

Mr. Enterline: No objection.
By the Court: No. 8 is given as requested.

Defendant's Offered Instruction No. 9

You are instructed that defendant is not liable to the shipper for any damages that may result to him by reason of the ordinary and usual incidents of transportation and that even though you find the shipment in question was delayed at various points along the line but that such delay was only the usual and ordinary delays of transportation of livestock, then defendant cannot be held responsible for any damages by reason of such delays.

Mr. Enterline: I think that is objectionable on the ground that it takes away the question that they are to exercise ordinary care in the transportation of the cattle and transport them with due diligence.
By the Court: No. 9 is refused.

Exception.

Defendant's Offered Instruction No. 10

If you find from the evidence that the cattle in question were driven too rapidly between Pitch Fork Ranch and Cody immediately prior to loading, and that by such too rapid driving they were rendered unable to withstand the hardships of ordinary transportation by railroad and that the damages in question were partly caused by such hard driving, then your verdict must be in favor of defendant.

Mr. Enterline: No objection.
By the Court: No. 10 is given without objection.

Defendant's Offered Instruction No. 11 (Withdrawn)

[fol. 255] Defendant's Offered Instruction No. 12 (Withdrawn)

Defendant's Offered Instruction No. 13

If you find from the evidence that the damages to any of the animals in question was due partly to the fact that said animals were allowed to eat Salt Sage shortly before loading, then you can not render any verdict in favor of plaintiff for any such damages.

Mr. Enterline: No objection.
By the Court: No. 13 is given as requested.

Defendant's Offered Instruction No. 14 (Withdrawn)

Defendant's Offered Instruction No. 15

If you find from the evidence that the damage to any of the animals in question was due partly to loading of said animals too heavily in the cars, then you cannot render any verdict for plaintiffs for any such damages.

Mr. Enterline: No objection.
By the Court: No. 15 is given as requested.

Defendant's Offered Instruction No. 16

If you find from the evidence that the damage to the animals in question was due partly to the fact that the caretaker in charge of the shipment failed to give to the animals proper care and attention while en route, then your verdict cannot be in favor of plaintiffs for any such damages.

Mr. Enterline: No objection.
By the Court: No. 16 is given as requested without objection.

Defendant's Offered Instruction No. 17

If you find from the evidence that the damage could have been averted by the caretaker unloading en route; that the caretaker in charge of the shipment had the opportunity to unload such animals en route, but negligently refused to avail himself of such opportunity, then you cannot render any verdict in favor of the plaintiffs for any such damages.

Mr. Enterline: That is objected to because the evidence on the part of the defendant shows that the only place where any question arose about unloading was at Judith Gap, and that the defendant's own witness, the yard master, testifies that they had not proper equipment at that point to unload, but that they only had equip- [fol. 256] ment for the unloading of fifteen cars and that the rest of the animals would have to have been taken and held.
By the Court: The objection is sustained.

Exception.

Defendant's Offered Instruction No. 18 (Withdrawn)

Defendant's Offered Instruction No. 19

If you find from the evidence that the cattle in question were in poor shipping condition at the time of loading at Cody and that the damages in question were caused partly by reason of such condition, then your verdict must be for defendant.

Mr. Enterline: No objection.
By the Court: No. 19 is given as requested.

Defendant's Offered Instruction No. 20

If you find from the evidence that the death or damage of the animals in question was caused by the extreme hot weather and the alleged fact that the cattle were not in condition to withstand the ordinary hardships of transportation upon the railroad in such weather, and not by reason of any negligence of defendant, then your verdict must be in favor of defendant, as to any damages claimed by reason of the alleged heat prostrations of the cattle in question.

Mr. Enterline: That is objected to because it is repetition and covered by other instructions, fully.
By the Court: The objection is sustained.

No. 20 is refused as covered.

Exception.

Defendant's Offered Instruction No. 21

You are instructed that any act of contributory negligence on the part of the plaintiffs, or their agents, in the handling of the shipment in question would defeat their right of recovery in this action for any damages to which such negligence was a contributory cause and therefore if you find from the evidence that plaintiffs' or their agents, were guilty of any acts of contributory negligence as set forth in the answer filed herein, and such negligence contributed to cause plaintiffs' damage, then you cannot allow the plaintiffs any compensation for any damage, if any, so caused in part by such contributory negligence, if any.

Mr. Enterline: No objection.
By the Court: No. 21 is given as requested.

[fol. 257]

Defendant's Offered Instruction No. 22

If you find from the evidence that the cattle in question were overheated before they were delivered to the defendant company at Mossmain and that by reason of such overheating the animals thereafter were prostrated, then plaintiffs cannot recover in this action by reason of such prostration.

Mr. Enterline: No objection.
By the Court: No. 22 is given as requested.

Defendant's Offered Instruction No. 23 (Withdrawn)

Defendant's Offered Instruction No. 24 (Withdrawn)

Defendant's Offered Instruction No. 25

You are instructed that the railway company is not under obligation to maintain a feeding station at every stop on the line of its railroad, but only at such places as under ordinary conditions would be sufficient to provide proper feeding and watering facilities for cattle upon the ordinary transportation and therefore, if it provides reasonable feeding and watering facilities at points at reasonable intervals upon its line of railroad, it has fulfilled its obligation in that regard and there is no proof in this case that it had failed to install such facilities.

Mr. Enterline: That is objected to as a comment on the evidence and for the further reason that there is a whole lot of proof that at Great Falls, Montana, they did not have proper watering facilities, had no pens to put the cattle in. The evidence also shows that the cattle had to be herded over at an artificial lake away from the yards entirely.

By the Court: Let the record show that it is modified by striking out all after the word "regard" in the next to the last line, and the instruction is given as modified.

Mr. Reynolds: Exception by the defendant as to the modification.

Defendant's Offered Instruction No. 25 as Modified

You are instructed that the railway company is not under obligation to maintain a feeding station at every stop on the line of its railroad, but only at such places as under ordinary conditions would be sufficient to provide proper feeding and watering facilities for cattle upon the ordinary transportation and therefore, if it provides reasonable feeding and watering facilities at points at reasonable intervals upon its line of railroad, it has fulfilled its obligation in that regard.

[fol. 258] Defendant's Offered Instruction No. 26 (No Instruction Numbered Twenty-six Offered)

Defendant's Offered Instruction No. 27

You are instructed that under the law the obligation to unload and reload the cattle in transportation rested upon the shippers and not upon the railway company and that therefore the railroad company is not under any obligation to furnish for the purpose of unloading or reloading the cattle in question expert help in that regard and that plaintiffs cannot complain in this action because the men who assisted in the unloading and reloading were not expert cattle men.

Mr. Enterline: That is objected to because under the law the railroad company is obliged to unload and care for the cattle in default of the shipper doing that, and this instruction would be inconsistent with the instruction given by the Court at the request of the plaintiffs. This being an interstate shipment they are bound by the acts of Congress which require the company to unload and feed the cattle in the event that the shipper does not, and in this case the defendant did furnish feed and charge the same to the plaintiff.

By the Court: Sustained. No. 27 is refused.

Exception.

Defendant's Offered Instruction No. 27-a

You are instructed that aside from doing the actual details of the unloading, loading or care of the cattle in transit the duty of supervising said unloading, loading and care rested primarily upon the plaintiffs and their agents, and they cannot recover for damages, if any, caused by negligence, if any, on their part in not properly supervising said unloading, loading or care (aside from doing the actual details of the same), or to which their said negligence, if any, contributed to the cause.

Mr. Enterline: That is objected to because inconsistent with instructions given at the request of plaintiff and for the reason that there is no evidence to predicate the instruction upon, and for the further reason that as appears from the evidence the defendant, without any particular request upon the part of the plaintiff's agent, the caretaker, began to assist in the unloading. There is no evidence tending to show any supervision on the part of the caretaker, and for the further reason that the defendant company was obliged to unload the cattle, and for the further reason that there is no evidence whatever to show that there was any damage of any character whatsoever from the caretaker participating in the unloading.

By the Court: The objection will be sustained. The offered instruction will be refused as not predicated upon the testimony.

Exception.

[fol. 259] Defendant's Offered Instruction No. 28

There being no evidence in this case of any damages resulting to the cattle in question by reason of their having been showered at Great Falls you cannot render any verdict in favor of plaintiffs for any damages by reason of such showering.

Mr. Enterline: No objection.

By the Court: No. 28 is given as requested without objection.

Defendant's Offered Instruction No. 29

There being no evidence in this case of any damages to plaintiffs by reason of rough handling of the train on which the cattle in question were being transported, you cannot render any verdict in favor of plaintiff for any damages by reason of alleged rough handling while in transit.

Mr. Enterline: That is objected to because there is evidence of some forty-seven head being injured around the head. There is evidence also tending to show that the train stopped with suddenness, throwing the caretaker off his feet.

By the Court: Instruction No. 29 is refused.

Exception.

Mr. Veazey: The defendant objects to all of the instructions proposed to be given on the ground that those given by the defendant defining the circumstances under which recovery can be allowed or cannot be allowed are inconsistent with the Court's instruction, I think it is No. 10, beginning with the words "You are instructed that if you find for the plaintiffs" and ending with the words "add the same to the damages hereinbefore mentioned" being the instruction to which I made a rather lengthy objection, in that in the defendant's instructions the Court submits the issue of damages to the jury as to whether recovery can be had for all or a part of the depreciation or of the deads, but under the instruction referred to, which was one requested by the plaintiffs, the jury is instructed that they must either find for the plaintiffs for the full amount of the deads and the depreciation, or nothing.

By the Court: The objection will be overruled.

Exception.

The Court gave instructions offered in the following order:

Defendant's offered instruction No. 1 as Court's instruction No. 1.
Defendant's offered instruction No. 2 as Court's instruction No. 2.
Defendant's offered instruction No. 3 as Court's instruction No. 3.
Plaintiff's offered instruction No. 1 as Court's instruction No. 4.
Plaintiff's offered instruction No. 2 as Court's instruction No. 5.
Plaintiff's offered instruction No. 3 as Court's instruction No. 6
Plaintiffs offered instruction No. 5 as Court's instruction No. 7.
[fol. 260] Plaintiff's offered instruction No. 8 as Court's instruction No. 8.
Plaintiff's offered instruction No. 10 as Court's instruction No. 9.
Defendant's offered instruction No. 4 as Court's instruction No. 10.
Defendant's offered instruction No. 8 as Court's instruction No. 11.
Defendant's offered instruction No. 10 as Court's instruction No. 12.
Defendant's offered instruction No. 13 as Court's instruction No. 13.
Defendant's offered instruction No. 15 as Court's instruction No. 14.
Defendant's offered instruction No. 16 as Court's instruction No. 15.
Defendant's offered instruction No. 19 as Court's instruction No. 16.
Defendant's offered instruction No. 21 as Court's instruction No. 17.
Defendant's offered instruction No. 22 as Court's instruction No. 18.
Defendant's offered instruction No. 25 as Court's instruction No. 19.
Defendant's offered instruction No. 28 as Court's instruction No. 20.
Plaintiff's offered instruction No. 11 as Court's instruction No. 21.
Plaintiff's offered instruction No. 14 as Court's instruction No. 22.
Plaintiff's offered instruction No. 15 as Court's instruction No. 23.

Mr. Veazey: The defendant further objects to the instructions given on the grounds that they do not cover the duty of the plaintiff to supervise the matter of loading, unloading and care of the animals in transit.

By the Court: The objection is overruled.

Exception.

After argument of counsel for the respective parties this cause was submitted to the jury for its determination. The jury subsequently returned into court and presented its verdict in favor of plaintiffs and against defendant, which verdict, omitting title of court and cause is as follows, to-wit:

VERDICT—Omitted; printed side page 43 ante

Thereafter, and on the seventeenth day of December, 1920, the Court rendered judgment on said verdict in favor of plaintiffs and against defendant for the sum of Twenty Thousand Six Hundred Eight-five and 90-100 Dollars, and — Dollars, costs of suit.

Thereafter, and on the seventeenth day of December, 1920, counsel for plaintiff served upon counsel for defendant herein, and filed. notice of entry of judgment, which omitting title of the court and cause is as follows, to-wit:

[fol. 261] To Great Northern Railway Company, a corporation, and I. Parker Veazey, Jr., and F. B. Reynolds, attorneys for said defendant:

You and each of you will please take notice that the judgment for the plaintiffs in the above entitled action and against the said defendant therein was entered in the above entitled cause prior hereto and on the 17th day of December, 1920, for the sum of Twenty Thousand Six Hundred Eighty-five and 90-100 ($20,685.90) Dollars and costs in accordance with the verdict of the jury returned on the 15th day of December, 1920.

Dated this 17th day of December, 1920.

E. E. Enterline, J. W. Snellbacher, Attorneys for Plaintiffs.

Thereafter, and on the 22nd day of December, 1920, counsel for defendant served upon counsel for plaintiffs, and filed herein, their notice of intention to move for a new trial, which notice of intention, omitting title of court and cause, is as follows, to-wit:

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL—Omitted; printed page 47 ante

That thereafter, and before the expiration of ten days after the rendition of said verdict and judgment, defendant elected to have its motion for a new trial heard upon a Bill of Exceptions and the

Court duly ordered that same be heard upon a Bill of Exceptions and, pursuant to stipulation between the parties, extended the time to prepare and serve defendant's Bill of Exceptions to the rulings made and proceedings had on the trial of the above cause, or to be used on motion for a new trial, to and including the 20th day of June, 1921.

And, now, within the time allowed by law and the orders of the above entitled Court, and its Judge who tried said cause, and the stipulations between the parties, comes the said defendant, and presents the foregoing as and for its Bill of Exceptions to the rulings made and proceedings had on the trial of the above entitled cause, and to be used on its motion for a new trial, and said defendant prays that the same may be signed, settled and allowed as such.

I. Parker Veazey, Jr., and Dillavon & Moore, Attorneys for Defendant, Great Northern Railway Company.

Due personal service of the foregoing Bill of Exceptions admitted, and receipt of a copy thereof acknowledged this 20th day of June, A. D., 1921.

E. E. Enterline, Attorneys for plaintiffs.

[fol. 262] IN DISTRICT COURT FOR YELLOWSTONE COUNTY

STIPULATION SETTLING BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing Bill of Exceptions is true and correct, and that the same may be settled, allowed, signed and certified as defendant's bill of exceptions to the rulings made and proceedings had on the trial of the above entitled cause, or to be used on motion for a new trial.

Dated the 15 day of July, A. D. 1921.

E. E. Enterline J. W. Snellbacher, Attorneys for Plaintiff.
I. Parker Veazey, Jr., and Dillavon & Moore, Attorneys for Defendant.

IN DISTRICT COURT FOR YELLOWSTONE COUNTY

ORDER SETTLING BILL OF EXCEPTIONS

STATE OF MONTANA,
County of Yellowstone, ss:

The Bill of Exceptions of the defendant in the above entitled cause, duly and regularly served, together with any amendments thereto proposed by the plaintiff, duly and regularly served, having been duly and regularly presented to the undersigned, the Judge who tried said cause, for settlement, and any amendments proposed as aforesaid having been passed upon, allowed or modified by the undersigned and incorporated in said Bill of Exceptions; and the parties having stipulated to the settlement of the foregoing Bill of Exceptions, and the matter of the final settlement of the foregoing Bill of Exceptions coming on now regularly to be heard:

This is to certify, pursuant also to stipulation between the parties, that the foregoing Bill of Exceptions is correct and sets forth all the evidence offered on the trial of said cause, and that where the said evidence appears by questions and answers, the same is necessary clearly to present for review the objections made and exceptions taken at said trial, and the grounds thereof, and the said Bill of Exceptions is hereby settled, signed and allowed as and for the Bill of Exceptions of the defendant in the above entitled cause to the rulings made and proceedings had on the trial of said cause, and to be used on motion for a new trial.

Dated at Billings, Montana, this 15th day of July A. D., 1921.

A. C. Spencer, Judge.

[File endorsement omitted.]

[fol. 263] (Title of Court and Case)

In District Court for Yellowstone County

Order Denying New Trial—Filed Nov. 4, 1921

Pursuant to stipulation filed herewith, the above entitled action came on for hearing before the undersigned Judge of the District Court, upon defendant's motion for a new trial, and the same having been argued by counsel for the respective parties, and taken under advisement, it is now this day ordered that the said motion of the defendant for a new trial be, and the same is, hereby overruled.

Dated November 3, 1921.

A. C. Spencer, District Judge.

[File endorsement omitted.]

In the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone

[Title omitted]

Notice of Appeal—Filed Dec. 7, 1921

To the Plaintiffs in the Above-entitled Cause and to Messrs. E. E. Enterline and J. W. Snellbacker, as their Attorneys:

You and each of you will please take notice that the defendant in the above entitled cause hereby appeals to the Supreme Court of the

State of Montana from the judgment dated in the above entitled cause on the 17th day of December, 1920, and entered and rendered by the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, upon a verdict of a jury in favor of the above named plaintiffs and against the defendant, and assessing the plaintiffs' damages at the sum of $20,685.90, which said judgment is in favor of the plaintiffs and against the defendant for the said principal sum of $20,685.90, and costs and which said judgment is the final and only judgment entered in said cause. Said appeal is taken from said judgment and from the whole thereof.

You and each of you will please take further notice that said defendant does hereby also appeal to the Supreme Court of the State of Montana from an order made in said cause, denying the motion of the defendant in said cause for a new trial, which said order was signed and filed in said court and cause on the 4th day of November, 1921, and that the said order is the only order made in said cause overruling the motion of the defendant for a new trial. Said appeal is taken from said order and from the whole thereof.

I. Parker Veazey, Jr., W. L. Clift, and W. H. Glover, Attorneys for Defendant.

[fol. 264] Endorsed: Personal service of the within notice this 7th day of Dec. 1921 is hereby accepted and admitted. E. E. Enterline, J. W. Snellbacher, Attorneys for Plaintiffs.

[File endorsement omitted.]

Evidence: Defendant's Exhibit One

Chicago, Burlington & Quincy Railroad Company

530,535-91 (blue pencil)

Live Stock Contract

This part of Contract for Auditor of Freight Accounts to be mailed with Forwarded Abstract on date Billing for Cars is reported.

Live Stock Contract

This contract, made and entered into in original duplicate this 16th day of July 1917, by and between (name of shipper:) L. G. Phelps, of (shipper's residence:) Cody, hereinafter called "the shipper," of the first part, and the Chicago, Burlington & Quincy Railroad Company, hereinafter called the "carrier," of the second part, witnesset*n*:

That for and in consideration of (Here insert rate. The word "Tariff" must not be used,) $36.00 per 36 ft. car, subject to minimum weights as shown in its published tariffs, classifications and rules, the carrier agrees to transport 32 cars loaded with (kind of stock:) Steers (numbers of waybills, initial and numbers of cars and number of animals, as noted in the left hand margin hereof) from (shipping point:) Cody, Wyo., to (where shipment leaves our rails:) Mossmain, Mont., consigned to (name of consignee and destination:) Galbreath Cattle Co., Seville, Mont., and the shipper, in consideration thereof, agrees to deliver the said animals to the carrier for transportation between the points aforesaid, upon the following terms, viz.:

1. Whereas, the rates and charges for which said animals may be lawfully carried are fixed and determined by the duly established and published tariffs, classifications and rules of said carrier, to which reference is hereby made, in accordance with which the said carrier has alternative and graduated rates for the carriage of live stock proportioned to the value thereof as declared by the shipper or his agent;

Now, therefore, for the purpose of enabling the carrier to apply the lawful rate as provided in its tariffs, the shipper hereby declares said animals to be of the value as follows, to-wit:

[fol. 265] Each Horse or Pony (Gelding, Mare or Stallion, Mule or Ass) .... Value. ......
Each Colt .... Value. ......
Each Ox, Bull or Steer .... Value. $75.00
Each Cow .... Value. ......
Each Calf .... Value. ......
Each Hog .... Value. ......
Each Sheep or Goat .... Value. ......

2. The carrier agrees to transport only over its own line and shall not be liable for loss, damages or injury not occurring on its own road, or its portion of any through route, nor after the said animals have been delivered to a connecting carrier, except as such liability may be imposed by law, but it is expressly agreed that in case of a through transportation this contract shall be for and inure to the benefit of any carrier constituting a part of a through line, and such carrier shall be liable to perform all the obligations of this contract.

3. In consideration of transportation hereby furnished for one person, designated by the shipper, who have endorsed their names hereon in the presence of the agent, such person or persons to accompany the stock, it is agreed that the said cars and the animals contained therein are and shall be in the sole charge of such person or persons for the purpose of attention to and care of said animals in transit, and said animals are to be loaded, unloaded, watered and fed by the shipper or his agent in charge.

4. The carrier does not agree to transport said animals by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch.

5. Suits for the recovery of claims for loss, damage or delay shall be instituted only within two (2) years after delivery of the property, or in case of failure to make delivery, then within two (2) years after reasonable time for delivery has elapsed.

Witness the name of the carrier by its agent, and the hand of the shipper, the day and the year first above written.

(Signed) L. G. Phelps, Shipper, Per (Signed) Wm. B. Wright. Chicago, Burlington & Quincy Railroad Company, By (Signed) T. F. Kling, Agent, at Cody Station, State of Wyo. 4970.

Parties actually in charge of and accompanying stock will write their own names in ink on both first and second sheets of this contract. Signatures must not be written with pencil. Agents will see that correct names of parties entitled to accompany the stock are written below and run a pen through the remaining lines. If no one in charge draw a pen and ink line through all spaces.

1. (signed) Wm. B. Wright.
2. —— ——.
3. —— ——.

[fol. 266] Parties in charge have written their own names above.
(Signed) T. F. Kling, Agent, Cody, Wyo., Station.

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

[Title omitted]

JUDGE'S CERTIFICATE TO EXHIBIT

STATE OF MONTANA,
County of Yellowstone, ss:

The undersigned, the Judge of the above entitled court, before whom the above entitled action was tried, does hereby certify that, attached hereto, is the original defendant's exhibit 1, offered and introduced in evidence on the trial of the above entitled cause and referred to in the bill of exceptions, to the proceedings had and rulings made on the trial of said cause.

Dated at Billings Montana, this 16th day of January, A. D. 1923.

A. C. Spencer, Judge of the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, Before Whom the Above-entitled Cause Was Tried.

No. 5001

STATE OF MONTANA:

In the Supreme Court, December Term, 1922

[Title omitted]

OPINION—Filed Feb. 21, 1923

Submitted January 22, 1923; Decided February 21, 1923

[File endorsement omitted.]

MR. JUSTICE STARK delivered the opinion of the court.

This action was instituted by the plaintiffs to recover for damages alleged to have been sustained by them as shippers of certain livestock over the defendant's line of railroad.

The complaint alleges that the plaintiff Phelps is a citizen and resident of the state of Wyoming; that plaintiff Galbreath Cattle Company is a Montana corporation engaged in business in this [fol. 267] state; that the defendant is a railway corporation, organized under the laws of Minnesota and engaged as a common carrier in operating an interstate railroad extending through Montana and other states, and that it maintained a station at Mossmain, in Yellowstone County, Montana, at which point the defendant's line connected with the line of Railroad of the Chicago, B. & Q. Railroad Company from Cody, Wyoming; from Mossmain the defendant's line of railroad extended to Seville in the state of Montana; that on the 16th day of July, 1917, at Cody, Wyoming, the plaintiffs delivered to the Chicago, B. & Q. Railroad Company 984 head of cattle in good, sound and healthy condition, which were loaded into thirty-two cars and consigned for transportation over said railroad and its connecting carrier, the defendant, to Seville, Montana; that the cattle were promptly transported by the Chicago, B. & Q. Railroad Company to Mossmain and delivered to the defendant in good, sound and healthy condition; that when the train of cattle arrived at Mossmain the weather was extremely hot and sultry; that the defendant was advised by plaintiffs, and knew, or by the exercise of ordinary care could have known, that unless said train was kept moving, there was great danger of the cattle becoming overheated and that injury and loss would result therefrom; and that thereafter defendant was negligent in the handling of said trainload of cattle in the following particulars:

(a) That it left the train standing on its tracks at Mossmain in a period of hot and sultry weather for about seven hours.

(b) That after the train left Mossmain it was stopped and allowed to stand for several hours in a suffocating gravel pit or deep cut, and was also unreasonable delayed at other points between Mossmain and Great Falls; that by reason of these delays it became necessary to unload said cattle at Great Falls.

(c) That after the train arrived at Great Falls it kept the cattle confined in cars for a number of hours instead of unloading them without delay, and prodded and clubbed a number of them.

(d) That it failed to afford reasonable means and opportunity for unloading, feeding, watering and resting the cattle at Great Falls where they were unloaded for that purpose.

(e) That it failed to unload said cattle at Great Falls into properly equipped pens for rest, feed and water.

(f) That it did not transport the cattle to Seville within a reasonable time, so that, instead of reaching that point July 18, they did not reach there until July 22.

That by reason of these acts of negligence the cattle became "overheated, bruised, shrunken, emaciated and rendered sick, feverish and of stale and unmarketable appearance and condition, lowered in grade, quality and selling market value, greatly reduced and lessened in weight and seriously injured and damaged, and 149 [fol. 268] head thereof were killed and died in transit," by reason of which the plaintiffs suffered damage in the sum of $45,633.

The defendant appeared in the action and filed a petition for removal thereof to the district court of the United States in and for the District of Montana, upon the grounds that the suit is of a civil nature, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States, and (b) is between citizens of different states. A proper and sufficient removal bond for costs was filed but the petition for removal was denied.

All the alleged negligent acts of the defendant were put in issue by its answer, which admitted the formal matters pleaded and also the receipt and transportation of the cattle by the Chicago, B. & Quincy Railroad Company, as alleged in the complaint, and their delivery to it at Mossmain. But it is alleged that the cattle were not in good, sound, healthy condition for shipping when they were delivered to the Burlington Railroad or when delivered to the defendant; that said stock was shipped under a bil of lading and livestock shipping contract which provided, amongst other things, "that the said cars and the animals contained therein should be in the sole charge of a person designated by the shipper to accompany the same for the purpose of attention to and care of said animals in transit and that said animals should be loaded, watered and fed by the shipper or the agent in charge;" admitted that after the train was set out at Mossmain it was not moved therefrom until about five or six hours thereafter, and that "after said train left Mossmain until the same arrived at Great Falls, Montana, the weather was extremely hot and that said cattle, by reason of said hot weather and the facts herein set forth, became overheated, prostrated and sick, and that 142 head thereof died at Great Falls, Montana, either at the time of the arrival of said train there or within a few days thereafter;" denied that the death or any injury to the cattle was due to any negligence on the part of the defendant but alleged that the same was due to and caused by certain acts or omissions of the plaintiffs, to-wit: (a) That when the cattle were delivered to the Burlington for transportation, and likewise when they were delivered to the defendant at Mossmain, they were not in good shipping condition; (b) that the plaintiffs had negligently failed to water the cattle for a long and unreasonable length of time prior to the loading thereof on the cars; (c) that they had negligently overdriven said animals and milled the same for several days prior to the loading thereof; (d) had negligently overlooked the animals in cars at Cody; (e) had negligently failed to give said cattle attention when they first showed signs of becoming weak; (f) had negligently failed to adequately care for the animals in transit, and (g) had negligently despatched but one caretaker in charge of said livestock, who could not, by reason of the size of the shipment and otherwise, adequately care for the same; and that be reason of these acts the cattle became prostrated by heat and by lack of water and became sick so that the 142 head died as set forth above.

[fol. 269] For a second and separate defense the answer alleges that the plaintiffs' damage, if any, was due to and caused by the contributing fault and carelessness of the shippers for the same reasons and upon the same grounds above set forth.

The affirmative allegations of the answer were put in issue by the plaintiffs' reply, which further alleged that at the times mentioned in the complaint and answer the defendant did not maintain at the station at Mossmain, or along its line of railroad from said station to the station of Seville, reasonable or adequate facilities or properly equipped pens for resting, watering and feeding the cattle; that when the train carrying the cattle arrived at Judith Gap the cattle were suffering with heat; that the defendant was thereupon advised of the condition of the cattle by the plaintiffs' agent in custody of the shipment and the defendant then told the plaintiffs' agent that there were no facilities to unload said cattle for rest, care and attention at said station but that the train would be rushed to Great Falls where there were adequate facilities, but that notwithstanding these facts the train was not transported with reasonable despatch from Judith Gap to Great Falls.

The cause was tried before a jury, which returned a verdict in favor of plaintiffs in the sum of $20,685.90, upon which judgment was entered. The defendant moved for a new trial, which was denied, and from this judgment and the order overruling its motion for a new trial it has appealed to this court.

The testimony in the case is voluminous, and we do not deem it necessary to set it out in detail, but will refer to portions of it when necessary in the course of the discussion of the various specifications of error.

(1) Defendant first contends that it was error for the court to deny its petition for removal of the cause of the federal court. This

petition was based on two grounds: (1) That the action arose under the laws of the United States, (2) that it is between citizens of different states.

This is an action to enforce the common law liability of the defendant for damages resulting from its negligence to an interstate shipment, and it is held that such an action is not one arising under "any law regulating commerce" within the meaning of the Judicial Code (Act March 3, 1911, Chap. 231, 36 Stat. 1092) of which the district court, by paragraph 1, is given jurisdiction regardless of citizenship, nor as based on the so-called Carmack Amendment to section 20 of the Act, embodied in Act of June 29, 1906, Chap. 3591, sec. 7, 34 Stat. 593, requiring the issuance of bills of lading for interstate shipments, the purpose of which is to make the carrier issuing such bill liable thereunder by statute for any loss or damage occurring on connecting lines. (Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co., 209 Fed. 895; Adams v. Chicago G. W. R. Co., 210 Fed. 362.) Therefore it was not removable on the first ground of defendant's motion.

In the case of Smith v. Lyon, 133 U. S. 315, it appeared that the plaintiffs were co-partners, one of them being a resident and citizen [fol. 270] of Missouri, and the other a resident and citizen of Arkansas. They commenced an action in the circuit court of the Eastern District of Missouri against the defendant Lyon, who was a citizen and resident of Texas. The petition set out a cause of action of which the court had jurisdiction so far as the nature of the same and the amount involved were concerned. The defendant appeared specially and filed a plea to the jurisdiction of the court on the ground that the suit was not brought in the district of the residence of either the plaintiffs or defendant. This plea was sustained and the action dismissed. On appeal to the supreme court of the United States the judgment was affirmed, the court holding that under the federal statute a circuit court of the United States has no jurisdiction on the ground of diverse citizenship if there are two plaintiffs to the action who are citizens of and residents in different states and the defendant is a citizen of and resident in a third state and the action is brought in the state in which one of the plaintiffs resides. In the case of Camp v. Gress, 250 U. S. 308, the reasoning in the case of Smith v. Lyon, supra, was expressly approved and applied. So far as the point here involved is concerned, the federal statute which was construed in Smith v. Lyon is the same as the existing statute.

A cause to be removable as involving a controversy between citizens of different states must be such a one as might have been originally brought in the federal court (Tennessee v. Bank, 152 U. S. 454; Mexican National Bank v. Davison, 157 U. S. 201; Cochran v. Montgomery County, 199 U. S. 260, 272.)

Since under the rule laid down by the supreme court of the United States in Smith v. Lyon, supra, the plaintiffs could not have originally brought this suit in the federal court of Montana, it could not be removed thereto by the defendant, and the court did not err in denying defendant's petition for removal.

We have given consideration to the case of General Investment Co.

v. Lake Shore & Mich. S. Ry. Co., (L. Ed. Adv. Sheets No. 4, 106, decided by the United States supreme court November 27, 1922), and also to the case of Lee v. C. & O. Ry. Co., (decided by that court on January 22, 1923, L. Ed. Adv. Sheets No. 8, 256). In view of the reasons given by the court for its holding in Smith v. Lyon, supra, we find nothing in these cases to warrant a departure from the rule therein announced.

(2) The defendant's specification of error No. 3 relates to the refusal of the court to give its requested Instruction No. 6, which is as follows: "If you find from the evidence that defendant had advices from the Burlington that the stock in question would be delivered at Mossmain at 4 P. M. and accordingly defendant made arrangements to make a connection out of Mossmain for them, based upon said advices, and was then advised that said shipment would not arrive until 10 P. M., defendant was not required to hold the engine or crew longer but was entitled to use the same for other freight and any delay on the part of the defendant which could be negligence on its part would begin not earlier than the time when the next avaiable crew or connection was available."

Prior to the loading of the cattle at Cody one of the plaintiffs had [fol. 271] counsel with the defendant's agents and had told them of the necessity and desirability of making a quick run from Cody to Seville and was advised by them that if the run from Cody to Mossmain could be made in eight hours or less, the run to Seville could be completed in less than thirty-six hours, which would avoid the necessity of unloading and feeding in transit.

The first advices from the Chicago, B. & Q. Railroad Company at Cody to the defendant were to the effect that the cattle would reach Mossmain at 4 o'clock P. M. However, they were not loaded in time to enable the train to reach Mossmain at that hour and subsequently the defendant was notified by the Chicago, B. & Q. Railroad Company that the train would not reach Mossmain until 10 P. M.

The testimony disclosed that in accordance with the first advices defendant had made arrangements to have an engine and crew ready for the stock train at 4 P. M., but on being notified that it would not reach Mossmain until 10 P. M. that engine and crew were used for other purposes. Later an order was given by defendant to another engine and crew for 9:45 P. M., but the defendant's despatcher testified he could not get the engine and crew at that hour for the reason that the crew's rest would not be up until 12:30 A. M. It developed that when the engine was finally ready to move, there was a considerable delay on account of a derailment so that it was not available to take the stock train from Mossmain until 5 A. M., according to the defendant's testimony, and not until 6 or 6:30 according to the plaintiffs'.

Pursuant to the information conveyed to defendant by the plaintiffs, as above stated, the company's despatcher had given instructions that the train carrying the plaintiffs' cattle was to have a strictly first class run, making twenty miles an hour including all delays, for the reason that the shippers were extremely anxious that the stock should go through to Seville without unloading. These instructions were embraced in a telegram or order introduced in evidence on behalf of the defendant.

The fact that defendant had allowed this train to stand on the track at Mossmain for a period of five to seven hours was some evidence of negligent delay. In the case of Buell et al. v. St. Louis & S. F. R. R. Co., 163 Pac. 537, it was held that in an action for negligent delay in the interstate transportation of livestock, there being some evidence of negligent delay, it was error to instruct the jury to the effect that if the livestock were transported in accordance with the published schedule of the railway company, the plaintiff could not recover. The train in this case was not being run on a regular published schedule, but as an extra stock train, and the defendant was under obligation to exercise reasonable diligence to move the same after it arrived at Mossmain, regardless of what had transpired prior to that time.

We think the offered instruction was open to the objection that it failed to advise the jury that the defendant would be required to exercise reasonable diligence to transport the train of cattle after it had arrived at Mossmain. The statement "negligence on its part would begin not earlier than the time when the next available crew or [fol. 272] connection was available" leaves the question of reasonable diligence out of the case. The court did not commit error in refusing the instruction.

(3) The defendant urges that the court committed error in allowing the plaintiffs to amend their complaint, increasing the amount of damages claimed from $35,000 to $45,000, which amendment was permitted just prior to the time the plaintiffs closed their case. The testimony on the part of the plaintiffs tended to show that the total amount of damages sustained by them was $33,839.52. Under the repeated decisions of this court the allowance of an amendment is within the sound discretion of the court, and unless there is an abuse of this discreation it will not be considered as error. In view of the fact that the jury subsequently returned a verdict of less than one half the amount asked for by the plaintiffs under the complaint as amended, we do not think the amendment as made prejudiced the rights of the defendant.

(4) The defendant specified as error V-A that the court erred in giving plaintiffs' requested Instruction No. 8, which is as follows: "You are instructed that if you find from the evidence in this case that the defendant in this case undertook to and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiffs compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding, and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana."

The rule is that when, as in this case, livestock is shipped under a valid, written contract providing that the shipper or his agent shall accompany them, and that he shall attend to the loading, unloading, feeding and watering of the same at his own expense and that on his failure to comply with this requirement the company shall do so, failure on the part of the shipper to comply with the contract is a default on his part and he cannot recover for damages arising therefrom. (Southern Ry. Co. v. Tollerson, 68 S. E. 798; 4 Elliott on Railroads, 2346.) However, it is also the rule that if either the shipper or carrier voluntarily undertakes to unload the stock, he cannot ordinarily hold the other responsible for the result of his own negligence in doing so, even though it might otherwise be the duty of the other to unload and care for the stock. (4 Elliott on Railroads, (3rd ed.), sec. 2346.)

In the case of San Antonio & A. P. Ry. Co. v. Dolan, 85 S. E. 303, it is held that a provision in a livestock shipping contract that the shipper should attend to loading and unloading at his own risk might be reasonable and valid, but it would not apply when the carrier himself in fact assumed control of the matter of loading and unloading. To the same effect is the case of Norfolk & W. R. R. Co. v. Sutherland, 17 S. E. 127.

[fol. 273] It therefore becomes necessary for us to review the testimony with reference to the unloading of the cattle at Great Falls and also their care while at that place. The witness Wright, who accompanied the train as plaintiffs' caretaker, stated that the train arrived at Great Falls at about 6. P. M. on July 17th and was placed on the sidetrack where it remained for probably more than an hour, after which it was taken to the stock yards where the unloading commenced; that immediately on the arrival of the train at Great Falls he went to dinner and did not return for probably an hour; that in the process of unloading he only had the assistance of the train men and a section crew and that he gave no direction at all in connection with the unloading; that the crew which was assisting was in charge of a foreman for the company.

Frank Carney, a witness in behalf of the plaintiffs, testified that he saw the cattle in the yards at Great Falls between the hours of 6 and 8 o'clock on the morning after the shipment arrived; that he did not know Mr. Wright but saw someone there who seemed to represent the shipper; that it did not appear to him that the unloading was being properly conducted, so he reported the matter to Mr. Pewters, the defendant's agent, saying in substance that for the protection of those cattle he, the agent, should get in and give them the attention that they required; whereupon Mr. Pewters requested the witness to look after them and he did so to some extent.

One of the defendant's witnesses John Ewinsky, who was the conductor in charge of the train in question from Judith Gap to Great Falls, testified that he was present when they began to unload and had charge of the train; that there were section men present assisting that when the train arrived at Great Falls he and Wright went to dinner and that the unloading started after they returned. Calvin Hankins, also a witness on behalf of the defendant, testified that he was road master at Great Falls at the time and assisted in unloading the cattle; that he was called at 7 o'clock; that he did not know whether the caretaker was present when he arrived but that he was there during the course of the evening. On cross-examination he stated: "My men had charge of the unloading that evening, were assisting in the unloading."

Another of the defendant's witnesses, Mr. Grueger, testified that he was general foreman of the defendant company on July 17th and as such assisted in looking after the unloading of the cattle. The unloading started about 7:30 in the evening and he arrived there about a quarter of eight and stayed until 9:30 on the following night; that he did not see the man in charge until about 10 o'clock and then did not know who he was until so informed by the special agent's department; after that he (Wright) did not give any instructions. He was simply in there helping like anybody else; that when he went to work the Greek section hands were assisting. "As far as the unloading was concerned that was attended to by Mr. Hankins and myself."

With reference to the care and feeding of the cattle after they were unloaded from the cars, the testimony shows that those which [fol. 274] were not down and which did not die before they were reloaded onto the train were under the charge of the plaintiffs, while those which were down and did subsequently die at Great Falls remained under the charge of the defendant. Speaking of those which were in charge of the plaintiffs, the witness Wright stated: "After they were all unloaded the cattle were kept for a time in the yards; then these were herded in a field that lies between the Milwaukee and the Great Northern tracks. A man by the name of Milsap, also an employee of plaintiffs, and myself were taking care of them while they were there."

The testimony disclosed that the cattle were shipped under the contract set forth in defendant's answer, which provided "that the said cars and the animals therein contained shall be in sole charge of such person or persons for the purpose of attention to and care of said animals in transit and said animals are to be loaded, unloaded, watered and fed by the shipper or his agents in charge." As above shown, the caretaker, Wright, was present when the unloading of the cattle began and he was bound by contract to attend to it. However, the testimony is susceptible of a construction that the defendant's agents did in fact assume the duty of unloading the cattle, for the defendant's yardmaster, Hankins, said: "My men had charge of the unloading that evening, were assisting in the unloading," and the defendant's general foreman, Grueger, said: "As far as the unloading was concerned, that was attended to by Mr. Hankins and myself."

As to the watering and feeding of the cattle after they were unloaded, we direct attention to the fact that until they were reloaded for shipment to Seville, all of the cattle (about 835 in number) which were not down and did not die were taken in charge by the plaintiffs and were kept in a yard of field between the Great Northern and Milwaukee tracks, being herded by employees of the plaintiffs.

Even through the instruction may have been warranted by the testimony so far as it related to the actual unloading of the cattle, the part thereof which told the jury that "while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls" was clearly outside the record, in that it failed to differentiate between the cattle which were actually and beyond dispute taken charge of, herded and cared for by the plaintiffs, and those which remained in charge of the defendant. In so far as the instruction placed upon the defendant the duty of caring for the cattle which were in actual charge of the plaintiffs it imposed a duty upon it which the plaintiffs themselves had by contract, and in fact, assumed to discharge. The giving of the instruction was error.

(5) Defendant's requested Instructions Nos. 27 and 27A were to the effect that the duty to unload and reload the cattle in transportation and to supervise the same, rested upon the plaintiffs and that defendant was under no obligation to furnish expert help in that regard, and that plaintiffs could not complain because the men who [fol. 275] assisted were not expert, and likewise that the could not recover damages, if any, resulting from negligence on the part of the plaintiffs in not properly supervising the same or to which their negligence in that connection contributed. As above shown, the contract under which the cattle were shipped expressly provided that the duties pointed out in these instructions were assumed by the plaintiffs, and the law as stated in Southern Ry. Co. v. Tollerson and 4 Elliott on Railroads, supra, is that the plaintiffs' failure to comply with this duty was a default on their part and they could not recover damages arising therefrom. The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the court as they should have been. The offered instructions were directed to that specific subject and should have been given. The courts's refusal to give them was error.

(6) By Instruction No. 21, the court told the jury: "You are instructed that if you find for the plaintiffs and should find that the loss of and the injuries to the cattle were occasioned by the negligence of the defendant, then you should award the plaintiffs damages as follows: (a) The fair market value at Seville, Montana, of the 155 head of cattle in the condition in which such 155 head would have arrived at Seville, Montana, on or about the 18th day of July, 1917, had they not been injured and died by reason of the negligence of the defendant * * *." The first objection to this instruction is that it assumes that 155 head of cattle were lost to the plaintiffs by reason of the negligence of the defendant.

The answer admitted and the testimony showed that 112 head of the cattle died before they were reloaded at Great Falls for shipment to Seville, and that seven head were left at Great Falls after this shipment, but the record is not clear as to whether they were left in care of the defendant or plaintiffs. It was shown, however, that two of these seven head were subsequently butchered by a veterinarian who had been employed by the plaintiffs when the cattle were being unloaded. It was also shown that after the cattle arrived at Seville six head died, but when they died and the cause of their death was left uncertain. The witness Thorp testified that they died "later in the fall," and again that they died "shortly after arrival at Seville;" and the witness Wright testified that there were a few head which "died shortly after arrival at Seville."

This testimony does not show that the butchering of the two head of cattle which were part of the seven head left at Great Falls and their consequent loss to the plaintiffs was the result of any act, negligent or otherwise, of the defendant, nor does it show when or from what cause the other five had died. The same statement it true with reference to the six head which died at Seville. Under this testimony it is only conjectural that the loss of the thirteen head of cattle last mentioned, was due to any fault of the defendant.

It may be noted here that of the 142 head of cattle which died at Great Falls, 140 were three-year-olds and two were yearlings; [fol. 276] that of those which subsequently died at Great Falls and Seville seven were yearlings and six were three-year-olds. The highest value placed on the three-year olds was $100 per head, and on the yearlings $60 per head making the total Maxiumu value of the thirteen head last mentioned $1,020.

This instruction in direct language told the jury that if plaintiffs were entitled to recover at all for any cattle which died, they must award them the value of 155 head. In other words, that the plaintiffs should either recover for 155 head or nothing. The instruction was not warranted by the evidence, and it was error to give it.

(7) In Instruction No. 22 the court told the jury: "If you find in favor of plaintiffs you may allow them interest upon the damages which you find they have sustained at the rate of 8% per annum from the 18th day of July, 1917, to this date." Defendant objected to the giving of this instruction upon the ground, amongst others, that the allowance of interest in this kind of an action is only in the discretion of the jury, and requested the court to add to the instruction the words, "Interest is in your discretion," which request was refused.

Section 8663, Revised Codes of 1921, provides: "In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury." In the case of Dewell v. Northern Pacific Ry. Co., 54 Mont. 350, 170 Pac. 752, it was held that under this statute interest may be allowed to the plaintiff in an action such as this. Counsel argue that the jury would understand this instruction as meaning that they "must" award interest,—that is, that it was one item which they might award and not an item which they might not award.

In cases where an instruction of this kind is warranted the jury should be specifically advised that the allowance of interest is in their discretion, and the court should have modified the instruction as requested by the defendant. However, it is impossible to say from this record whether the jury did in fact allow any amount of interest. The complaint asked for damages in the sum of $45,000. The testimony on the part of the plaintiffs tended to show damages accruing to them, without taking the items of interest into consideration, in excess of $30,000 and the verdict of the jury was in favor of the plaintiffs for the sum of $20,685.90.

(8) The court's Instructions 6 and 7 on the burden of proof were in accord with the rule in this state as laid down in the case of Nelson v. Great Northern Ry. Co., 28 Mont. 297, 72 Pac. 642, and are not objectionable.

(9) This disposes of all of defendant's specifications of error, save only the one that the verdict was excessive and was against the weight of the evidence.

The court erred in giving and refusing to give instructions as detailed in the foregoing discussion. However, the error in Instruction No. 8 which was given, and in refusing defendant's requested [fol. 277] Instruction Nos. 27 and 27A related only to the unloading and care of the cattle at Great Falls. The error in Instruction No. 11 was in assuming that the plaintiffs were entitled to recover for 155 head of cattle if entitled to recover at all. Had the instruction been limited to 142 head it would not have been erroneous. The discussion of Instruction No. 22 shows that we are unable to say whether the jury did in fact allow the plaintiffs any amount for interest on the damages found.

We have carefully reviewed all of the testimony given at the trial. Eliminating from consideration the unloading and feeding of the cattle at Great Falls and the loss of the thirteen head which died subsequent to the reshipment from that point, we are confronted with the situation that as to the remaining 142 head there was a direct conflict in the testimony upon all of the alleged negligent acts of the defendant and the alleged acts of contributory negligence on the part of the plaintiffs. These matters were all thoroughly tried and submitted to the jury for their determination under proper and sufficient instructions. The jury resolved these issues in favor of the plaintiffs. From the record we cannot say that their finding in that respect was against the weight of the evidence.

With reference to the thirteen head of cattle which plaintiffs claim were lost to them subsequent to the time when the stock was reshipped from Great Falls to Seville and which we have above determined were, according to the testimony, of the maximum value of $1,020, the judgment cannot be sustained for the reasons indicated in our discussion of Instruction No. 21.

Our conclusion on the whole case is that it should be and is hereby remanded to the district court of Yellowstone county with directions to grant a new trial unless within ten days after the filing of the remittitur the plaintiffs shall give their consent in writing that the judgment be reduced in the sum of $1,020. If such consent is given, the judgment will be modified accordingly as of the date of its original entry, and, together with the order denying the new trial, will stand affirmed, each party to pay his own costs on appeal.

Remanded with Directions.

Albert P. Stark, Associate Justice.

We concur: Llewellyn L. Callaway, Chief Justice. Charles H. Cooper, Wm. L. Holloway, Albert J. Galen, Associate Justices.

IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

PETITION FOR REHEARING

Comes now the Great Northern Railway Company the Appellant in the above entitled cause, and respectfully petitions the Court for a rehearing of this cause on the following grounds.

[fol. 278] 1. In its opinion the Court rules that this cause was not removable to the United States Court (a) on the ground that it arose under laws regulating interstate commerce, and (b) on the ground of diversity of citizenship. In ruling that this cause did not arise under the interstate commerce laws of the United States, the Court has overlooked the decision in the case of:

> M., K. & T. Ry. Co. vs. Ward, 37 Sup. Ct., 617, 3rd paragraph, page 619,

which was referred to on the oral argument but is not cited in the opinion, and, in the ruling that the cause was not removable on the ground of diversity of citzenship, the Court says that a citizen of Wyoming and a citizen of Montana could not sue a citizen of Minnesota in the Federal Court of Montana, because such Federal Court would not have jurisdiction of such an action. Thereby the Court overlooks the distinction in such an action between jurisdiction and venue and we especially bring to the Court's attention that this ruling is contrary to the decision by the Supreme Court of the United States in the case of:

> General Investment Co. vs. Lake Shore, etc., Ry. Co., Dec. 15, 1922, L. Ed. Adv. Sheets No. 8, Page 107, Jan. 1, 1923, Sup. Court Rep., Adv. Sheets No. 4, pg. 106,

which was cited in the oral argument but, not being cited in the opinion, has been overlooked; and said ruling is also contrary to the decision of the Supreme Court of the United States in the case of:

> Lee vs. Chesapeake & Ohio Ry. Company Sup. Court Rep. Adv. Sheets No. 43, March 1st, 1923, pg. 230; L. Ed. Adv. Sheets, No. 8, Feb. 15, 1923, Page 256

decided subsequently to the oral argument and not cited by the Court in its opinion, though attention was timely called to the decision by letter addressed to the Clerk of Court with the request that he bring it to the attention of the Justices. Because these controlling decisons were rendered while this case was pending on appeal and hence were not cited in the briefs but only orally, it would seem that their oral citation has been overlooked.

2. The second point decided by the Court is that Requested Instruction No. 3 was not improperly refused to the effect that "any delay on the part of the defendant which could be negligence on its part would begin not earlier than the time when the next available crew or connection was available." The Court says that this Instruction was subject to objection that it did not require defendant to exercise reasonable care and leaves the question of reasonable diligence out of the case. In this regard, defendant respectfully urges that the Court overlooks that this Instruction is expressly defining the earliest time that due care could be required. It says that defendant was not obliged to hold the first train and negligence (a failure to exercise due care) could begin not earlier than when it was possible to get another crew. Of course defendant was entitled to an instruction that negligence would not begin that early [fol. 279] or until after it was possible to get another crew, and such crew could by due diligence, as stated by the Court be despatched. But this instruction does not eliminate due care, but in effect is telling the jury that defendant is not to be held liable for a delay until it was possible to get a new crew, and thereafter would be bound only—use due care. The Court has overlooked the nature and meaning of this instruction.

3. The Court finds that it was error to give Instruction No. 8, as regards the duty to unload and feed and care for the animals at Great Falls, and that it was error to refuse Requested Instructions Nos. 27 and 27A regarding the same subject. Yet the Court apparently holds these errors harmless, though they concerned the plaintiffs' entire case, and separately over $20,000 claimed by the plaintiffs as damages to the animals not killed.

4. The Court finds that it was error in the Court to instruct the jury that they should allow interest at 8 per cent from July 18th, 1917, to December 18th, 1920, and that the jury should have been advised that interest was only in their discretion, but the Court holds this harmless error, because the plaintiff demanded $35,000, and the proof left a play of judgment for more than $30,000, and the jury awarded $20,685.90. Thereby the Court overlooks that this sum awarded by the jury probably and even presumably and certainly did include over 3 and 5/12 years' interest, and thus represents a sum at least 27% in excess of the principal found by the jury, or over $4,000. Yet the Court does not scale the judgment accordingly.

Removal to Federal Court.

At the time of the oral argument, the Court was referred to the case of:

> General Inv. Co. vs. Lake Shore, etc., Ry. Company, Dec. 15, 1922 L. Ed. Adv. Shts. No. 4, Page 107 Jan. 1, 1923, Supt. Ct. Reps. Adv. Shts. No. 4, Page 106.

Where the Court held that, irrespective of residence, a case founded on the laws of the United States was removable to the United States Court in the State where the suit was brought, and the Supreme Court of the United States said that the provisions of the Federal Statutes defining venue in cases brought in the Federal Courts, had nothing to do with jurisdiction, either original or on removal, and did not relate to venue or removal, which was separately provided for.

As the plaintiffs contended that this decision related only to cases founded on Federal law, notwithstanding the clear, general language to the contrary, we later, by letter directed to the Clerk of the Court, submitted a decision by the United States Supreme Court decided subsequent to the oral argument and, therefore, not then available, entitled:

> Lee vs. Chesapeake & Ohio Railway Company, Sup. Ct. Rep. Adv. Shts. No. 8, Mar. 1, 1923, Page 230 L. Ed. Adv. Shts. No. 8, Feb. 15, 1923, page 256

[fol. 280] holding that, where jurisdiction on removal is founded on diversity of citizenship, the only limitation is that the defendant must be a non-resident, and that the venue is the Federal District of the State where the suit is brought and that the venue provisions referred to by plaintiffs have nothing to do with venue or jurisdiction on removal.

As these cases were necessarily called to the Court's attention only by the unsatisfactory method of citing them orally in the argument, and later by letter directed to the Clerk's office, and as they were not cited in the Court's opinion, we assume that they were overlooked. Hence, it would seem that this petition for a rehearing could be rested on these two citations, and defendant should be entitled to a rehearing to present the question of removal.

Instruction as to When Negligence Would Begin

The evidence in this case showed that the defendant had everything lined up for a fast movement out of Mossmain, promptly at 4 P. M., the time of the expected delivery by the Burlington. But, as defendant was then advised that loading had hardly been completed and the animals would not be delivered until 11 P. M., the defendant used the engine and crew for other perishable freight. The next engine and crew would be available at Billings, at 12:30 A. M.; that is to say, this would be the first time that it would be possible to have an engine and crew out of Billings on the way to Mossmain. This engine was derailed in getting it out of the round house, so that there was further delay in getting to Mossmain.

We contended, that on this evidence, as negligence is a failure to use the care required by law, the law did not require defendant to hold its power at Billings, at 4 P. M., because of the shippers' delay in loading, but could use that power for other freight, and defendant's duty to exercise care in moving the plaintiffs' shipment would begin not earlier than when it was possible to have another engine and crew. Of course it would be defendant's duty to exercise reasonable care to move to Mossmain any engine and crew as soon as it was available. But the instruction in question simply defined a time when this duty of care could at the most begin; it could not begin until the next engine and crew was available, that is to say, until it was possible to have the next engine and crew.

Under the evidence, the next crew and engine was not available—it was not possible under the law to move them to Mossmain—until 12:30 A. M. Therefore, defendant's duty to use reasonable care would not begin until this engine and crew was available. Thereupon defendant would be under no obligation to use care to move this available engine and crew to Mossmain. It was for the jury to determine whether the derailment at Billings, after the engine was available, was caused by negligence or whether, after the engine and crew were available at Billings, defendant exercised reasonable care in their movement. The instruction does not concern moving the engine and crew with care after they were available, because the [fol. 281] instruction is dealing with conditions prior to the engine and crew being available.

The law would be that (1) defendant could not be negligent at least until after another engine and crew was available. After that (2) it would not be negligent if it did not do everything possible to move that engine and crew so available, but would be liable (3) only for a failure to use reasonable diligence in dispatching the engine and crew so available. The instruction in question concerned the first subdivision, and not the second or third.

The question of due care and diligence was not involved because the question at issue was, when would any obligation of care arise; the instruction declared that the duty of care to avoid delay, after the connection was missed, would not begin until after it was possible to get another engine and crew.

We submit, therefore, that the Court has overlooked the nature and meaning of the instruction as defining a period at least before the expiration of which defendant could not be negligent, and has confused the absence of duty before the minimum of period expired with the duties which would arise after this period expired.

Duty to Unload and Care for the Animals

The Court finds expressly that it was error to give Instruction No. 8 placing the duty to care for the cattle at Great Falls on the defendant, at least as regards 835 out of 984 of the animals involved. The Court also expressly finds that it was error to refuse defendant's Instruction No. 27 and No. 27 A, placing the general duty to unload and care for the animals on the shipper. Yet the

Court reaches the conclusion that this may have been harmless error. It was heretofore assumed between the parties, that if this was error, it was clearly reversible error.

The plaintiffs claimed some $15,000 damages for the 155 dead animals, and some $20,000 to $30,000 damages to the 835 live animals. The jury may have found that defendant was liable for only a part of the deaths, and for part of the $30,000 damage to the 835 head, or it may have found defendant liable for all of the deaths and that the damage to the remainder was $5,000 roughly. How the jury reached the verdict of $20,685.90 no one can figure. How then can the Court find that these errors concerning duties relating to $30,000 claimed damages out of $45,000, or to 835 head out of 981 head roughly, did not affect the result.

It is conceded that error occurred. How can error ever be reversible if this is not a ground for a reversal? Who can say whether, if the jury had been instructed as the Court says they should have been instructed, the verdict would not have been for much less?

We urge the Court to read the opinion showing the clear adjudication of the error, and, therefore, how unwarranted, under the issues in this case, is the holding that these errors were without prejudice. They were prejudicial to a far greater extent than the value of the [fol. 282] 13 head, whose deaths were not accounted for and because of which the Court modified the judgment.

The Court finds that the jury was incorrectly instructed that if the verdict was for the plaintiff, they should include as one item of damage, interest at 8 per cent from July 18th, 1917, to December 18th, 1920, and that the jury should have been instructed that interest was only in their discretion. The jury has awarded $20,685.90. Therefore, the Court assumes that interest may not have been included by the jury.

But how can the Court say the jury did not award interest? Is not the presumption proper that the jury followed the Court's instruction and gave interest? Is it not more reasonable to assume that, as the Court erroneously said that interest should be awarded, the jury granted it?

Suppose that the jury had awarded $30,000 or the full amount, $45,000.00, who can say that the jury did not include interest, and who can say that the jury did not find some less principal sum but reached $30,000 and $45,000 by adding interest to that principal sum?

Indeed it is impossible on the testimony to figure a verdict for Twenty Thousand, Six Hundred and Eighty-five Dollars and ninety cents, without first assuming that these odd cents are reached by computing interest, or taking it into consideration.

But why need defendant show that interest was allowed by the jury? All defendant need show is that error was committed and that this may have affected the jury. It is harmless only if it is shown that it did not, or could not have affected the jury.

As the verdict was for over $20,000 and this may have included 3½ years' (3 years 5 months) interest, this $20,000 represents a sum more than 25 per cent above the principal damage. If the principal damage was $16,000 this interest would bring the verdict to over $20,685.90 awarded? The error thus cont-ibuted to over $4,689.90 damages awarded. The plaintiffs' option for a new trial should then be further conditioned on the plaintiff- remitting the further sum of $4,685.90 in addition to the $1,020.00, leaving the judgment $14,980, and on such substantial changes, defendant should be entitled to its costs.

Conclusion

As the opinion shows clear error the judgment, if it were to be sealed, should be further sealed at plaintiffs' option. In fact, other errors in instructions are such that the maximum amount of prejudice done thereby cannot be ascertained, and, therefore, reversal is required. Indeed reversal is required under the decisions of the Su- [fol. 283] preme Court of the United States, for as to the effect of the error in denying the petition for a removal, we would cite:

Gordon vs. Longest, 10 L. Ed., 900;
Goldey vs. Morning News, 156 U. S., 518; 15 Sup*t*. Ct., 509; 39 L. Ed., 517;
Kanouse vs. Martin, 14 L. Ed., 660; Steamship Co. vs. Tugman, 106 U. S., 118; 1 Sup*t*. Ct. 58; 27 L. Ed., 89;
Powers Ry. Co., 169 U. S., 92; 42 L. Ed., 673;
Kern vs. Hindekoper, 103 U. S., 485; 26 L. Ed., 673;
Insurance Co. vs. Dunn, 22 *l* Ed., 68;
Marshall vs. Holmes, 141 U. S., 589; 12 Sup*t*. Ct., 62 35 L. Ed., 870.

Respectfully submitted, I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Appellant.

Dated: Great Falls, Montana, March 5th, 1923.

IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

RESPONDENTS' OBJECTIONS TO PETITION FOR REHEARING

We will discuss the appellant's grounds for rehearing in the order presented in its petition for rehearing.

It is still insisted by appellant that the cause is removable from the state court to the federal court upon the two grounds heretofore urged by it, namely (1) that a federal statute is involved and (2) upon the diversity of citizenship. In support of these contentions counsel for appellant cites three cases.

M. K. & T. Ry. Co. v. Ward, 37 Sup. Ct. 317.
Gen. Inv. Co. v. Lake Shore M. S. Ry. Co., 43 Sup. Ct. 106 (Advance Sheet).
Lee v. Chesapeake & Ohio Ry. Co. No. 8 Adv. Sheet Sup. Ct. 230.

The foregoing cases were called to the court's attention before the opinion was handed down but it is contended by counsel for appellant that the court overlooked them. Whether overlooked or not the foregoing cases can in no way alter the opinion rendered.

In the case of M., K. & T. Ry. Co. v. Ward, supra, the action was brought by Ward against the initial carrier and Houston & Texas Ry. Co. and the connecting carriers, Mo., Kan. and Texas Ry. Co., of Texas and the Mo., Kan., and Tex. Co. The action in that case was predicated or based on the bill of lading, issued by the initial carrier for any loss, damage or injury to the property transported and [fol. 284] which was caused either by the initial carrier or any connecting carrier to which the goods were delivered.

1 Roberts Federal Liabilities of Carriers, Secs. 305-334.
Penn. R. Co. v. Olivet Bros. 243 U. S. 574; 37 Sup. Crt. 468.

It is correctly stated in the opinion of Mr. Justice Stark that the action in this case is to enforce the common law liability of the defendant for damages resulting from its negligence to an interstate shipment. The cases cited in the opinion are clear and conclusive in support of the holdings of this court upon the question under discussion. The case of Gen. Inv. Co. v. Lake Shore and M. S. Ry. Co. et al., is clearly one arising under federal statute and therefore was removable from the state court to the federal court. The question of diversity of citizenship in that case was in no sense involved.

But it is now contended that the recent case of Lee v. Chesapeake and Ohio Ry. Co. is decisive on the question of citizenship and that the cause is removable from the state court to the federal court. Counsel for appellant have apparently not discovered the distinction between the Lee case and the case of Smith v. Lyon 133 U. S. 315 and Camp v. Gress 250 U. S. 308 cited by this court in support of its holding that the cause is not removable from the state court to the federal court. These cases last referred to have in no sense been overruled, by the decisions of the Supeme Court of the United States in the Gen. Inv. Co. and Lee cases. They are not even mentioned in these cases.

We quote the following from the case of Smith v. Lyon, supra:

"In the case of Coal Co. v. Blatchford, 11 Wall. 172, Mr. Justice Field, referring to these decisions, states the effect of them in the following language: 'In other words, if there are several co-plaintiffs, the intention of the act is that each plaintiff must be competent to sue, and if there are several co-defendants each defendant must be liable to be sued, or the jurisdiction cannot be entertained.' The question was very fully considered in the case of Sewing-Machine Cos. 18 Wall. 553, where the same proposition is stated in almost identical language. And in the case of Iron Co. v. Stone, 121 U. S. 631, 7 Sup. Ct. Rep. 1010, the chief justice reviews all these cases, and reaffirms the doctrine as applicable to cases arising under the act of 1875. * * *"

We do not think, in the light of this long-continued construction of the statute by this court during a period of nearly 100 years, in which the statute has been the subject of renewed legislative consideration and of many changes, but has always retained the language which was construed in the case of Strawbridge v. Curtiss, that we are at liberty to give that language a new meaning when it is used in reference to the same subject-matter. It is not readily to be conceived that the Congress of the United States in a statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States, using language which has been construed in a uniform manner for over 90 years by this court, intended that [fol. 285] that language should be given a construction which would enlarge the jurisdiction of those courts, and which would be directly contrary to that heretofore placed upon it by this court."

10 Sup. Crt. Rep. 304.

We also direct the court's attention to the following excerpts taken from the opinion of Camp v. Gress, supra:

"Congress re-enacted in the Judicial Code this provision expressly permitting, in states having more than one district, all defendants resident within the state to be sued in any district thereof in which one of them resides; while it made no similar provision for the case where the several defendants reside in different states. If Congress, in re-enacting the provisions of section 51, had intended that it should establish a rule with reference to defendants resident in different states contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language. No reason appears, therefore, for refusing to apply here the rule of Smith v. Lyon, supra."

39 Sup. Crt. Rep. 481.

We also quote the following sections taken from the Judicial Code which are quoted in the case of Puget Sound Sheet Metal Works, et al. v. G. & N. Ry. Co., 195 Fed. 350, a case cited by us in our original brief:

"Sec. 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

Sec. 295. The arrangement and classification of the several sections of this act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed."

195 Fed. 350-351.

It is next contended that this court committed error in holding that Instruction No. 6 requested by appellant was properly refused by the trial court. It seems to us that this contention has been clearly and fully answered on pages 8 to 10 of the opinion prepared by Mr. Justice Stark. Counsel for appellant seem to overlook the fact that this particular stock train was not running on any scheduled time fixed by appellant but, according to the directions of its dispatcher, was to have a strictly first class stock train run making twenty miles per hour including all delays for the reason stated in the dispatch that the shippers were extremely anxious that the stock should go through to Seville without unloading (Tr. 380). The case of Buell et al. v. St. Louis and S. F. R. R. *Coal*, 163 Pac. 537, [fol. 286] cited in the opinion of this court, is certainly authority supporting the opinion upon that question. More than that the appellant through its dispatcher directed the prompt movement of this particular train and which ought to be bound by his action.

We now come to the consideration of the giving of Instruction No. 8 and the trial court's refusal to give Instructions Nos. 27 and 27A requested by appellant. In this connection we find the following on page 8 of the appellant's petition for rehearing: "It was heretofore assumed between the parties, that if this was error, it was clearly reversible error." This statement is entirely gratuitous on the part of counsel for appellant. The respondents have never conceded the foregoing, either in their brief or in the oral argument.

In this connection it seems to be urged by counsel for appellant that the jury may have found that defendants were liable for only part of the deaths and for part of the damage to the remaining herd. This contention is rather singular in view of the fact that counsel for appellant at pages 46-57 of their brief admit that the animals suffered heat prostration and that the only question was when and where it was caused. In its answer it was alleged that the injury was done to the cattle before they were loaded at Cody. As stated in the opinion of this court these issues were all submitted to the jury and the jury found in favor of the plaintiffs.

The last ground urged in support for the petition for rehearing is the interest question. Upon urging this ground as well as the other grounds for rehearing which attack the verdict of a jury, counsel for appellant seem to overlook entirely the well-settled rule that not only must an appellant affirmatively show that error was committed in the trial of the cause but that such error was prejudicial. If the jury in this case had been instructed that they must allow interest if they found for the plaintiffs then there might be some right in the contention of counsel for appellant. Certainly this court in reviewing the record would not be authorized to come to the conclusion that interest had been allowed because the verdict was for a certain sum and ninety cents. If verdicts of juries could be disturbed simply because of figures used in their verdict, the courts would be busily engaged in disturbing verdicts of juries. If 142 deaths were caused by heat prostration it seems to us that it would of necessity follow that the negligence of the appellant which caused these deaths also caused injury to the balance of the herd. The testimony conclusively shows that injury did result to the balance of the herd. The testimony of appellant shows that they were injured. We will refer to the testimony of several of appellant's witnesses.

Sturdevant, the brakeman, testified:

"I mean by that, that cattle got in such bad shape afterwards that my attention was afterwards called to it. In my estimation their condition at Judith Gap would be called bad." (Tr., 326.)

[fol. 287] Weazel Head, a witness for defendant testified:

"I could not say whether these cattle looked as if they had been only about 12 hours on the road. I could not tell that. They looked pretty badly gaunted and weak." (Tr., 317.)

In view of the testimony introduced in the trial of this cause and in view of the fact that the jury fixed the amount of damage much less than the amount fixed by respondents' evidence we believe that this court would not be warranted in compelling the respondents to retry the cause. There is nothing in this record to indicate that the appellant did not obtain a fair and impartial trial. Nor, is there anything in the record tending to show that the jury did not fairly and impartially consider the issues involved in the cause under the evidence submitted by both parties.

We conclude that there is no substantial reasons under the authorities to grant the appellant's petition for rehearing.

We believe that the opinion handed down by this court, through Mr. Justice Stark has fully answered all the grounds now made in the petition for rehearing and that the opinion is based upon good reason and supported by authority.

Respectfully submitted, E. E. Enterline, J. W. Snellbacher, Attorneys for Respondents.

Minutes of Supreme Court

Seventh Day of March Term

Monday, March 19th, 1923.

Court convened pursuant to recess.

Present: The Hon. Lew. T. Callaway, Chief Justice. The Hon. Charles H. Cooper, Associate Justice. The Hon. Wm. L. Holloway, Associate Justice. The Hon. Albert J. Galen, Associate Justice. The Hon. Albert P. Sark, Associate Justice. Dana M. Easton, Clerk. M. N. Race, Marshal.

And the following proceedings were had:

[Title omitted]

ORDER DENYING REHEARING, ETC.

Appellant's motion for a re-hearing in this cause is denied and a stay of remittitur until the 1st day of April, 1923, is ordered.
(Signed) Llewellyn L. Callaway, Chief Justice. Attest: (Signed) Dana M. Easton, Clerk.

[fol. 288] IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

PETITION FOR ORDER STAYING REMITTITUR

To the Honorable Supreme Court of the State of Montana and its Justices:

The petition of Great Northern Railway Company, appellant herein, respectfully represents:

I. That, on the 21st day of February, 1923, this Court rendered and passed its judgment in the above entitled cause, in and by which said judgment the Court held that it was not error in the trial court to deny to the appellant a removal of said cause to the United States District Court for the District of Montana, and otherwise, in and by said judgment, your petitioner conceives that it has been deprived of federal rights, and your petitioner desires that the Supreme Court of the United States be asked to pass finally upon these questions, and said questions are such that they can be determined, and said judgment of the Supreme Court of the State of Montana reviewed by the Supreme Court of the United States only in its discretion by a petition for a writ of certiorari.

II. That the Act of Congress and the rules of the Supreme Court of the United States fix the time within which petition for Writ of Certiorari may be filed therein at three months, and it is further provided by the rules of the Supreme Court of the United States that the party making application for said writ shall, as a part of such application, furnish the Court with a certified copy of the whole record, and that thirty printed copies of the petition for the writ, and the brief in support thereof, shall be filed, and that notice of the date of the submission of the petition, together with copy of the petition and brief, aforesaid, shall be served on counsel for the respondents at least three weeks before such date for the submission of said petition.

III. That your petitioner is prepared to perfect the record in this case, and will file its petition for said writ on or before the 21st day of May, 1923, and, with this end in view, is engaged in the preparation of said petition, and that your petitioner is proceeding with said application with due diligence.

IV. That your petitioner is advised that, in order that the proceedings may remain in their present status, pending the disposition of such petition for said writ, an order of this Court is required to stay the issuing of a remittitur herein.

Wherefore, your petitioner prays that this Court enter an order, directing the Clerk of this Court to hold the remittitur in this cause, pending the filing of the aforesaid petition in the Supreme Court [fol. 289] of the United States, until the 21st day of May, 1923, and that if said petition shall be filed in said Supreme Court of the United States on or before that day, the remittitur hereunder shall be further held until the Supreme Court of the United States shall act upon said petition, and if it shall grant the same, until said judgment shall be finally reviewed by said Supreme Court of the United States.

I. Parker Veazey, Jr., and W. L. Clift, R. H. Glover, Attorneys for Petitioner, Great Falls, Montana.

Affidavit of I. Parker Veazey, Jr., to above paper omitted in printing.

IN THE SUPREME COURT OF MONTANA

ORDER STAYING REMITTITUR

This cause coming further to be heard on this 29th day of March, 1923, upon consideration of the foregoing petition and upon motion of I. Parker Veazey, Jr., Counsel for Great Northern Railway Company, appellant,

It is hereby ordered that the remittitur in the above entitled cause shall not issue herein, but shall be stayed until the 21st day of May, 1923, and that if, on or before that day there shall be filed with the Clerk of this Court an affidavit of Counsel for said appellant showing that a petition for a Writ of Certiorari has been filed by said appellant in the Supreme Court of the United States, then the remittitur herein shall be held for a further period thereafter, and shall not issue before the final disposition shall be made by the Supreme Court of the United States of the petition for said Writ, and if the same shall be granted, until the final disposition of said cause by the Supreme Court of the United States.

Llewellyn L. Callaway, Chief Justice.

IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

STIPULATION FOR REVIVAL OF ACTION, ETC.

It is hereby stipulated, by and between E. E. Enterline and J. W. Snellbacher, attorneys for Annice W. Phelps and Frances P. Belden, as executrices, and Eugene Phelps, as executor, of the last will and testament of L. (Louis) G. Phelps, deceased, and Galbreath Cattle Company, and I. Parker Veazey, Jr., W. L. Clift and R. H. Glover, attorneys for the appellant in the above entitled cause, as follows:

That L. (Louis) G. Phelps, one of the respondents in the above entitled cause, died testate in the County of Park, State of Wyoming, on the 31st day of May, 1922. That on the 5th day of July an order [fol. 290] was duly given and made by the District Court of the State of Wyoming, in and for the County of Park, in a proceeding entitled "In The Matter of the Estate of Louis G. Phelps, Deceased," whereby the last will and testament of the said Louis G. Phelps was admitted to probate, and where and by said order, Annice W. Phelps, Frances P. Belden and Eugene Phelps were duly appointed executrices and executor, respectively, under said will and testament, and in said estate. That on the said 5th day of July, 1922, the said Annice W. Phelps, Frances P. Belden and Eugene Phelps, duly qualified as such executrices and executor of the said last will and testament of L. G. Phelps, deceased, and thereupon became, ever since have been, and now are, the duly appointed, qualified and acting executrices and executor, respectively, of the said last will and testament of L. G. Phelps, deceased, in said estate.

That a duly certified copy of the order admitting the last will and testament of the said L. (Louis) G. Phelps, deceased, to probate, together with the qualifications of the said executrices and executor, respectively, is hereto attached and made a part of this stipulation.

That an order may be given, made and entered in the above entitled cause, upon the filing and presentation of this stipulation at any time by this Court, reviving said action on behalf of said L. (Louis) G. Phelps, one of the above named respondents, in the name of the said executrices and executor, respectively, of the said last will and testament of the said L. G. Phelps, deceased, as respondents, in lieu of the said L. G. Phelps, deceased.

That the respondents in the above entitled cause shall have until the 15th day of September, 1922, within which time to prepare and serve their brief in the above entitled cause, and that an order may be made and entered by this Court at any time, granting such extension.

(Signed) E. E. Enterline, (Signed) J. W. Snellbacher, Attorneys for the Executrices and Executor above named, and for Galbreath Cattle Company.

(Signed) I. Parker Veazey, Jr., (Signed) W. L. Clift and R. H. Glover, Attorneys for Appellant.

IN DISTRICT COURT, FIFTH JUDICIAL DISTRICT

THE STATE OF WYOMING,
County of Park, ss:

In the Matter of the Estate of LOUIS G. PHELPS, Deceased

LETTERS TESTAMENTARY

THE STATE OF WYOMING,
County of Park, ss:

The last will of Louis G. Phelps, deceased a copy of which is hereunto attached, having been proved and recorded in the District Court [fol. 291] within and for the county of Park, Annice W. Phelps, Frances P. Belden and Eugene Phelps who are named therein as such are hereby appointed executors.

Witness, George S. Russell, Clerk of the District Court of the Fifth Judicial District, within and for the County of Park with the Seal of the Court affixed, the 5th day of July, 1922.

George S. Russell, Clerk, by Orilla Downing, Deputy Clerk.
(Seal.)

THE STATE OF WYOMING,
County of Park, ss:

We do solemnly swear that we will perform, according to law, the duties of Executors of the last Will and Testament of Louis G. Phelps, deceased.

Annice W. Phelps, Frances P. Belden, Eugene Phelps.

Subscribed and sworn to before me this 5th day of July, A. D. 1922.

George S. Russell, Clerk, by Orilla Downing, Deputy Clerk.
(Seal.)

THE STATE OF WYOMING,
County of Park, ss:

I, George S. Russell, Clerk of the Fifth Judicial District Court within and for the County and State aforesaid, do hereby certify the foregoing to be a true and complete copy of Letters Testamentary in re Estate of Louis G. Phelps. Issued to Annice W. Phelps, Frances P. Belden, and Eugene Phelps.

In testimony whereof, I have hereunto subscribed my hand and affixed the official seal of said Court at my office in Cody, Wyoming, this 6th day of July, A. D. 1922.

(Signed) George S. Russell, Clerk of the District Court,
(Signed) By Orilla Downing, Deputy. (Seal.)

MINUTES OF SUPREME COURT

Thirty-fourth Day of December Term

Wednesday, February 21st, 1923.

Court convened pursuant to recess.

Present: The Hon. Lew L. Callaway, Chief Justice; The Hon. Charles H. Cooper, Associate Justice; The Hon. Wm. L. Holloway, Associate Justice; The Hon. Albert J. Galen, Associate Justice; The Hon. Albert P. Stark, Associate Justice; Dana M. Easton, Clerk; M. N. Race, Marshal.

[fol. 292] And the following proceedings were had:

[Title omitted]

ORDER FOR REVIVAL OF ACTION

Upon motion, supported by stipulation, and representations having been made to the court that the above named L. G. Phelps, one of said respondents, has died during the pendency of this cause, it is ordered: That said action be revived on behalf of said L. (Louis) G. Phelps, one of the above named respondents, in the names of Annice W. Phelps, Frances P. Belden, as executrices, and Eugene Phelps as executor, respectively, of the last will and testament of the said L. G. Phelps, deceased, as respondents, in lieu of the said L. G. Phelps, deceased.

(Signed) Llewellyn L. Callaway, Chief Justice.

Attest: (Signed) Dana M. Easton, Clerk.

UNITED STATES OF AMERICA,
State and District of Montana, ss:

Office of the Clerk of the Supreme Court of Montana

CLERK'S CERTIFICATE

The undersigned, as Clerk of the Supreme Court of the State of Montana, does hereby certify and declare as such Clerk, that attached hereto is a full, true and correct copy of the following original papers, entries and documents as the same appear of record in the office of the undersigned, as such Clerk, in that certain cause filed in said Supreme Court on appeal, and entitled L. G. Phelps et al., Respondents, vs. Great Northern Railway Company, Appellant, Cause No. 5001, to-wit:

1. A copy of the transcript on appeal filed by Appellant;

2. A copy of such portion of the original Exhibit One, being a livestock contract of the Chicago, Burlington & Quincy Railroad, re-

ferred to in said transcript as defendant's exhibit 1, introduced upon the trial of said cause in the trial court, as is involved in and pertinent to said action;

3. A copy of the Opinion and Judgment of the Supreme Court of the State of Montana;

4. A copy of the Petition for Rehearing filed by Appellant;

5. A copy of Respondent's Objections to Said Petition for Rehearing;

[fol. 293] 6. A copy of the Order of said Court denying said Petition for Rehearing;

7. A copy of Appellant's Petition for an Order Staying the Remittitur in said Cause, and the Order Staying said Remittitur;

8. A copy of a stipulation providing for the reviving of said cause of action on behalf of L. G. Phelps, one of the respondents herein, in the names of Annice W. Phelps and Frances P. Belden as executrices and Eugene Phelps as executor, respectively, of the last will and testament of L. G. Phelps, deceased, as respondents, in lieu of the said L. G. Phelps, deceased;

9. A copy of the order reviving said cause of action on behalf of L. G. Phelps, one of the respondents herein, in the names of Annice W. Phelps and Frances P. Belden as executrices and Eugene Phelps as executor, respectively, of the last will and testament of L. G. Phelps, deceased, as respondents, in lieu of the said L. G. Phleps, deceased;

which said papers constitute a full, true and correct copy of the entire transcript of the record of the said Cause in said Supreme Court, including all proceedings in said Supreme Court of the State of Montana.

In witness whereof, the undersigned has hereunto set his hand and affixed the Seal of said Supreme Court of the State of Montana, this 14th day of April, A. D. 1923.

Dana M. Easton, as Clerk of the Supreme Court of the State of Montana.

WRIT OF CERTIORARI AND RETURN—Filed Aug. 4, 1923

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

Return by Clerk of the Supreme Court of the State of Montana to the Writ of Certiorari from the Supreme Court of the United States.

UNITED STATES OF AMERICA,
State of Montana, ss:

Office of the Clerk of the Supreme Court of the State of Montana

In obedience to the Writ of Certiorari from the Supreme Court of the United States to the Supreme Court of the State of Montana, attached hereto, the undersigned, as Clerk of said Supreme Court of the State of Montana, does hereby make the following return thereto, to-wit:

[fol. 294] I. There is attached hereto the said original Writ of Certiorari.

II. That the record and proceedings in the cause referred to in said Writ of Certiorari (entitled in said Supreme Court of the State of Montana, L. G. Phelps, et al., Respondents, vs. Great Northern Railway Company, a corporation, Appellant, Cause No. 5001, on appeal from a judgment of the District Court for Yellowstone County, Montana, rendered on the 17th day of December, 1920) has been lately certified by the undersigned and filed in the office of the Clerk of the Supreme Court of the United States in support of the petition of said Appellant filed in said Supreme Court of the United States, praying for a Writ of Certiorari to the Supreme Court of the State of Montana to review said cause.

III. That there is attached hereto a full, true and correct copy of the original Stipulation of Counsel for the respective parties to said cause as to how a return shall be made by the undersigned to said Write and, under the instruction of counsel for the Appellant, said stipulation is hereby certified as a return to said Writ.

In witness whereof, the undersigned has hereunto set his hand and affixed the Seal of said Supreme Court of the State of Montana, this 30th day of July, A. D. 1923.

Dana M. Easton, as Clerk of the Supreme Court of the State of Montana. (Seal of Supreme Court, State of Montana.)

IN THE SUPREME COURT OF THE STATE OF MONTANA

(Cause No. 5001)

[Title omitted]

STIPULATION FOR RETURN TO WRIT OF CERTIORARI

It is hereby stipulated and agreed by and between the parties to the above entitled cause, appellant and respondents, by and through their respective counsel of record, that the certified copy of the transcript of the record filed in the Supreme Court of the United States with the petition for Writ of Certiorari, filed in said Supreme Court of the United States by the above named Appellant as petitioner, to review the above entitled cause, may be taken as, and shall be the return to the Writ of Certiorari granted by the Supreme Court of the United States to said Supreme Court of the State of Montana, and issued out of and under the Seal of said Supreme Court of the United States on the 23rd day of June, A. D. 1923.

Dated this 23rd day of July A. D. 1923.

I. Parker Veazey, Jr., Attorneys for Appellant. Samuel Herrick and E. E. Enterline, Attorneys for Respondents, per S. H.

[fol. 295] UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Being informed that there is now pending before you a suit in which Great Northern Railway Company is appellant, and L. G. Phelps and Galbreath Cattle Company are respondents, No. 5001, which suit was removed into the said Supreme Court, by virtue of an appeal from the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 296] In the Supreme Court of Montana

Order Remanding Cause to District Court, December Term, A. D. 1922

The Chief Justice of the Supreme Court of the State of Montana to the Honorable Judge of the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, Greeting:

Whereas, in the said District Court in a cause between Galbreath Cattle Company, and Annie W. Phelps, Francis P. Belden, as executrixes, and Eugene Phelps, as executor of the last will and testament of L. G. Phelps, deceased, Plaintiffs and Respondents, and Great Northern Railway Company, a corporation, Defendant and Appellant, wherein the Judgment of the said District Court, entered in said cause on the 17th day of December A. D. 1920 was in favor of the said Plaintiffs and Respondents and against the said Defendant and Appellant as by the inspection of the transcript of record of said Court in said cause which was brought into the Supreme Court of said state by virtue of an appeal, agreeably to the statute of said state and the rules of said Supreme Court in such case made and provided, fully and at large appears.

And whereas, in the December term of court in the year of our Lord, one thousand nine hundred and twenty two said cause came on to be heard before said Supreme Court and was argued by counsel [fol. 297] Whereupon, On consideration, it is now here ordered and adjudged by this Court that the Judgment of the Court below, entered in this cause on the 17th day of December A. D. 1920 be and the same is hereby remanded to the District Court of Yellowstone County with directions to grant a new trial unless within ten days after the filing of the remittitur the plaintiffs shall have given their consent in writing that the judgment be reduced in the sum of $1,020 (one thousand and twenty dollars). If such consent is given, the judgment will be modified accordingly as of the date of its original entry, and, together with the order denying the new trial, will stand affirmed, each party to pay his own costs on appeal.

Costs in this Court:

Appellant, Appearance	$....
Respondent, Appearance	$....
Remittitur	$8.80

February 21, A. D. 1924.

You therefore, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

Witness the honorable Lew L. Callaway, Chief Justice of the Supreme Court of the State of Montana, this 9th day of April, A. D. 1924.

J. W. Crosby, Clerk of the Supreme Court of the State of Montana. (Seal.)

[fols. 298-317] IN THE SUPREME COURT, DECEMBER TERM, 1922

OPINION—Filed February 21, 1923; omitted; printed page 266 ante

[fol. 318] IN DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

L. G. PHELPS and GALBREATH CATTLE COMPANY, a Corporation, Plaintiffs,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant

ORDER REVIVING ACTION—Filed May 15, 1924

Now on this day, the above cause came on regularly to be heard upon the stipulation made and filed herein by E. E. Enterline and J. W. Snellbacher, attorneys for Annice W. Phelps and Frances P. Belden, as executrices and Eugene Phelps as Executor of the last will and testament of L. (Louis) G. Phelps, deceased, and Galbreath Cattle Company, and I Parker Veazey, Jr., W. L. Clift and R. H. Grover, attorneys for the defendant in the above entitled cause, for an order reviving said action on behalf of said L. (Louis) G. Phelps, one of the above named plaintiffs, in the name of the said executrices and executor, respectively, of the said last will and testament of the said L. G. Phelps, deceased, as plaintiffs, in lieu of the said L. G. Phelps, deceased.

And it appearing from said stipulation that said L. (Louis) G. Phelps, one of the plaintiffs in the above entitled cause, died testate in the County of Park, State of Wyoming, on the 31st day of May, 1922, and that on the 5th day of July, 1922, an order was duly given and made by the District Court of the State of Wyoming in and for the County of Park, in a proceeding entitled, "In The [fol. 319] Matter of the Estate of Louis G. Phelps, deceased," whereby the last will and testament of the said Louis G. Phelps was admitted to probate, and wherein and by which said order, Annice W. Phelps, Frances P. Belden and Eugene Phelps were duly appointed executrices and executor, respectively, of the said last will and testament, and in said estate.

And it further appearing that on the said 5th day of July, 1922, the said executrices and executor, respectively, duly qualified as such executrices and executor of the said last will and testament of L. G. Phelps, deceased, and thereupon became, and ever since have been, and now are, the duly appointed, qualified and acting executrices and executor, respectively, of the said last will and testament of said L. G. Phelps, deceased, in said estate. And the court being now fully advised in the premises.

It is hereby considered and ordered by the court as follows:

That this action be and hereby is revived on behalf of said L. (Louis) G. Phelps, now deceased, one of the above named plaintiffs, in the name of said executrices and executor, respectively, of the said last will and testament of the said L. G. Phelps, deceased, as plaintiffs, in lieu of the said L. G. Phelps, deceased.

That on and subsequent to the making of this order, such revival and substitution, all proceedings hereafter shall be carried on and conducted in this court in the name of the said executrices and executor and Galbreath Cattle Company, a corporation, as plaintiffs, and the Great Northern Railway Company, a corporation, as defendant.

Done in open court this 15th day of May, 1924.

Frank P. Leiper, Judge.

[File endorsement omitted.]

[fol. 320] IN DISTRICT COURT OF YELLOWSTONE COUNTY

L. G. PHELPS (ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, and Eugene Phelps, as Executor of the Last Will and Testament of L. G. Phelps, Deceased, being Substituted in Lieu of L. G. Phelps, Deceased), and Galbreath Cattle Company, a Corporation, Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant

JUDGMENT—Filed May 15, 1924

This action came on regularly to be heard on the 10th day of December, 1920, on the issues joined on the pleadings herein, before the Honorable A. C. Spencer, one of the judges of the above entitled Court. The plaintiffs appeared by E. E. Enterline, Esq., their attorney, and the defendant by I. Parker Veazey, Jr., Esq., its attorney.

Whereupon a jury was duly impaneled and sworn to try the issues in said cause, and thereupon the trial of said cause was proceeded with and witnesses on the part of the plaintiffs and defendant were sworn and examined. The introduction of evidence having been concluded, and the Court having charged the jury, and said cause having been argued before the jury by counsel, was thereupon on the 15th day of December, 1920, submitted to the jury for its verdict. Whereupon the jury retired to consider of its verdict, and thereafter, and on the 15th day of December, 1920, said jury returned into court with its verdict, which omitting the title of the court and cause, is in words and figures following, to-wit:

[fol. 321] "We, the jury duly impaneled and sworn in the above entitled cause do find the issues generally for the plaintiffs and do assess their damages in the sum of Twenty Thousand Six Hundred eighty-five & 90/100 Dollars, in the sum of — as above (Interest included) Dollars, and we do assess plaintiffs total damages in the sum of — as above $20,685.90 Dollars.

Edward G. Bragg, Foreman."

That thereafter, and on the 17th day of December, 1920, judgment was, in accordance with said verdict duly rendered and entered in favor of the plaintiffs and against the defendant, Great Northern Railway Company, for the said sum of $20,685.90, with interest thereon at the rate of eight (8) per cent per annum.

That thereafter the defendant duly took an appeal to the Supreme Court of the State of Montana from said judgment, and from an order by said District Court denying its motion for a new trial. That thereafter said cause came on for hearing before said Supreme Court of Montana, and on the 21 day of February, 1923, the said Supreme Court of Montana duly rendered its judgment remanding said cause to the above entitled Court, with directions to grant a new trial unless within ten (10) days after the filing of the remittitur from said Supreme Court in the above entitled Court and cause, the plaintiffs should give their consent in writing that said judgment be reduced in the sum of $1,020.00, and to the effect that if said consent should be given as aforesaid, said judgment should be modified accordingly as of the date of its original entry.

That thereafter a remittitur from said Supreme Court in said cause was obtained by the plaintiffs, and thereafter, on the 15th day of May, 1924, said remittitur from said Supreme Court was [fol. 322] duly filed in said Court and cause by the plaintiffs, and thereupon, and within ten days thereafter, the plaintiffs duly gave their consent in writing to the reduction of said judgment in the sum aforesaid, and thereupon, upon motion of the plaintiffs, who appeared by their said attorneys, and the defendant appearing also by its attorney, an order was duly given and made by the above entitled Court that said previous judgment be vacated and set aside and that judgment be rendered and entered herein in favor of the plaintiffs and against the defendant in the sum of $19,665.90, as of the said 17th day of December, 1920.

All and singular the matters aforesaid being considered, and the Court being fully advised in the premises,

Wherefore, by virtue of the law and by reason of the premises aforesaid:

It is hereby ordered, adjudged and decreed, that the said judgment so rendered and entered in the above entitled cause and dated the 17th day of December, 1920, upon a verdict of a jury, be and the same is hereby vacated and set aside and displaced by this judgment, and that the plaintiff do have and recover of and from the defendant Great Northern Railway Company, the sum of $19,665.90, together with interest thereon at the rate of eight (8) per cent per annum from the 17th day of December, 1920, together with plaintiffs' costs and disbursements, hereby taxed and allowed in the sum of $781.20; and that this judgment rendered this 15th day of May, A. D., 1924, be entered herein in the place and stead of said previous judgment and nunc pro tunc as of December 17, 1920.

Witness the Honorable F. P. Leiper, Judge of the District Court for the Seventh Judicial District, duly called to sit in the above entitled Court, and now presiding in the place and stead of one of the [fol. 323] Judges of said District Court, and the Seal of said Court hereunto affixed this 15th day of May, A. D., 1924, as of the 17th day of December, 1920.

Done in open Court this 15th day of May, A. D. 1924, and ordered entered nunc pro tunc as above.

Frank P. Leiper, Judge Presiding.

Attest: Fred Inabnit, Clerk. (Court Seal.)

[File endorsement omitted.]

[fol. 324] IN DISTRICT COURT OF YELLOWSTONE COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed May 15, 1924

To the Plaintiffs in the above-entitled cause and to E. E. Enterline, Esq., and J. W. Snellbacher, Esq., as their attorneys:

You and each of you will please take notice: That the defendant in the above entitled cause hereby appeals to the Supreme Court of the State of Montana from the judgment dated in the above entitled cause on the 15th day of May, A. D. 1924, and entered and rendered on said day by the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, nunc pro tunc as of the 17th day of December, 1920, which said judgment is in favor of the plaintiffs and against the said defendant, for the principal sum of $19,665.90, together with interest thereon from the said 17th day of December, 1920, and for costs; which said judgment is a judgment entered in said cause pursuant to a remittitur from the Supreme Court of Montana, finding that a previous judgment for the sum of $20,685.90, rendered herein upon a verdict of a jury, was excessive to the extent of $1,020.00, and [fol. 325] giving the plaintiffs an election to take judgment herein for said sum less said sum of $1,020.00, and which said judgment was entered herein pursuant to consent of the plaintiffs to a reduction in said amount, which said judgment is the final and only judgment now outstanding in said cause. Said appeal is taken from said judgment, and from the whole thereof.

(Signed) I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant.

Indorsed: Served and filed May 15, 1924.

[fol. 326] IN THE DISTRICT COURT OF YELLOWSTONE COUNTY

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed in Supreme Court May 16, 1924

Whereas, heretofore judgment was rendered in the above entitled cause, dated December 17, 1920, and thereafter the defendant prosecuted an appeal to the Supreme Court of the State of Montana from said judgment, and from an order denying its motion for a new trial, and thereafter the said Supreme Court rendered its judgment that said case be remanded to the above entitled Court with directions to grant a new trial unless within ten (10) days after the filing of the remittitur from said Supreme Court the plaintiffs should give their consent in writing that said judgment be reduced in the sum of $1,020.00, and that thereupon judgment should be entered accordingly as of its original entry, and thereafter the defendant applied to and obtained from the Supreme Court of the United States a Writ of Certiorari to review said judgment of the Supreme Court of the State of Montana, and said cause was submitted to said Supreme Court of the United States, being entitled therein "No. 312, October Term, 1923, Great Northern Railway Company, Petitioner, vs. Galbreath Cattle Company, et al., on Writ of Certiorari to the Supreme Court of Montana"; and thereafter the said Supreme Court [fol. 327] of the United States dismissed said proceeding for want of jurisdiction, for that the said judgment of the Supreme Court of Montana was not a final judgment in said cause, and thereupon the remittitur from said Supreme Court of the State of Montana was filed in the above entitled court and cause, and the plaintiffs gave their said written consent to the reduction of said judgment, and accordingly judgment was rendered and entered on the 15th day of May, 1921, nunc pro tunc as of December 17, 1920, in favor of the plaintiffs and against the defendant, for the sum of $19,665.90, together with interest and costs, and the defendant desires to take an appeal from said judgment to the Supreme Court of the State of Montana; and,

Whereas, it is the desire of the parties hereto that said appeal by the defendant be expedited as much as possible consistent with due deliberation by the Court upon the issues thereby raised,

Now, therefore, pursuant to Section 9745, Revised Codes 1921, of Montana, it is hereby certified and stipulated by the attorneys in said cause:

1. That the transcript on appeal filed in the Supreme Court of the State of Montana upon the appeal by Great Northern Railway Company from said judgment rendered by the above entitled Court in the above entitled cause, dated December 17, 1920, together with the copy of the remittitur from said Supreme Court of Montana on said appeal, filed in said District Court in the above entitled cause, hereto attached, and the attached copy of the judgment rendered

and entered by said District Court in said cause on May 15, 1924, pursuant to said remittitur, the attached copy of the order dated May 15, 1924, substituting parties plaintiff, and the copy of the notice of appeal by said Great Northern Railway Company to the [fol. 328] Supreme Court of Montana, from said judgment rendered May 15, 1924, may be accepted as the transcript on appeal herein, which said transcript, as so composed of said previous transcript and of said copies of said remittitur, order, judgment and notice of appeal, sets forth full, true and correct copies of the following original papers on file in the office of the Clerk of the above entitled Court in the above entitled action, being cause No. 7369, to-wit: the judgment roll in said cause, the bill of exceptions of the defendant to the rulings made and proceedings had on the trial of said cause, and the notice of appeal by the defendant from said judgment rendered and entered on May 15, 1924, nunc pro tunc as of December 17, 1920, which said notice of appeal was filed in said Court and cause on May 15, 1924.

2. It is further stipulated and certified that the attached printed copy of the transcript of the record in the Supreme Court of the United States of a cause in said Court entitled "October Term, 1923, No. 312 (Great Northern Railway Company, Petitioner, vs. Galbreath Cattle Company, et al., on Writ of Certiorari to the Supreme Court of Montana"), and embracing 295 pages, constituting a correct abstract of said transcript, together with said copy of said remittitur, order, judgment, and notice of appeal, may be taken as an abbreviated transcript on appeal for the consideration of the Court, and that service of any transcript on appeal herein is hereby waived, and that no transcript herein need be printed, and that said abbreviated transcript contains and sets forth full, true and correeet copies of the following original papers on file in the office of the Clerk of the above entitled Court in the above entitled action, being cause No. 7369, to-wit:

I. The complaint of the plaintiff (pages 1 to 5), the notice of petition and bond on removal (page 5), defendant's petition for re- [fol. 329] moval (pages 6 to 8), removal bond (page 8), affidavit of service (page 8), order denying removal (pages 8 to 9), the demurrer filed by the defendant (page 9), the defendant's answer (pages 9 to 14), the reply to the answer (pages 15 to 17), the verdict of the jury (page 18), the former judgment dated December 17, 1920 (pages 18 to 19); and that attached hereto is a true copy of said remittitur from said Supreme Court of Montana, order, and of said judgment dated May 15, 1924, which said papers constitute the judgment roll in said action;

II The bill of exceptions of said defendant to the rulings made and proceedings had on the trial of said cause (pages 21 to 262);

III. That attached hereto is a full, true and correct copy of said notice of appeal filed by the defendant on May 15, 1924, from said judgment dated May 15, 1924.

We do further stipulate that an undertaking on said appeal in due form has been properly filed by the defendant.

Dated May 15, 1924.

(Signed) E. E. Enterline, J. W. Snellbacher, Attorneys for Plaintiffs. I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 330] IN SUPREME COURT OF MONTANA

L. G. PHELPS (ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, and Eugene Phelps, as Executor, of the Last Will and Testament of L. G. Phelps, Deceased, Being Substituted in Lieu of L. G. Phelps, Deceased), and Galbreath Cattle Company, a Corporaiton, Plaintiffs and Respondents,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Appellant

PETITION TO ADVANCE CAUSE AND TO SETTLE RECORD—Filed May 16, 1924

To the Honorable the Supreme Court of the State of Montana;

The petition of Great Northern Railway Company respectfully represents:

1. That heretofore, and on the 17th day of December, A. D. 1920, the District Court for Yellowstone County, Montana, rendered a judgment in favor of the plaintiffs in an action in said Court, "L. G. Phelps, et al., vs. Great Northern Railway Company," and thereafter an appeal was taken to said Supreme Court of the State of Montana from said judgment, and from an order denying said defendant's motion for a new trial, and thereafter said Supreme Court of the State of Montana rendered its judgment remanding said cause to said District Court, with directions to grant a new trial, unless within ten (10) days after the filing of the remittitur from said Supreme Court in said District Court and cause, the plaintiffs should give their consent in writing that said judgment be reduced in the sum of [fol. 331] $1,020.00, and to the effect that if said consent be given as aforesaid, said judgment should be modified accordingly as of the date of its original entry. That thereafter the defendant applied to and obtained from the Supreme Court of the United States a Writ of Certiorari to review said judgment of the Supreme Court of Montana, and said cause was submitted to said Supreme Court of the United States, being entitled therein "No. 312, October Term, 1923, Great Northern Railway Company, Petitioner, vs. Galbreath Cattle Com-

pany, et al., on Writ of Certiorari to the Supreme Court of the State of Montana," and thereafter the said Supreme Court of the United States dismissed said proceeding for want of jurisdiction, for that the said judgment of the Supreme Court of Montana was not a final judgment in said cause. That thereafter the Clerk of the Supreme Court of the State of Montana delivered said remittitur to the plaintiffs, and thereafter and on May 15, 1924, the said remittitur from said Supreme Court was duly filed in said District Court and cause by the plaintiffs. Thereupon, and within ten days thereafter, the plaintiffs duly gave their consent in writing to the reduction of said judgment in the sum aforesaid; and thereupon, and on the 15th day of May, 1924, judgment was duly rendered and entered in said District Court and cause in favor of the plaintiffs and against the defendant, for the sum of $19,665.90, and costs, nunc pro tunc as of December 17, 1920; that the defendant has served and filed in said District Court and cause a notice of appeal from said judgment, and it is the desire of the parties to said appeal that said appeal be expedited as much as possible consistent with due deliberation upon the issues thereby raised.

2. That with this object in view the said parties have signed a certificate and stipulation to a transcript on appeal, which said stipulation and certificate is self-explanatory.

3. That all questions raised upon this appeal have heretofore [fol. 332] been argued to the above entitled court, and are fully presented in the briefs filed by the appellant as petitioner in said Supreme Court of the United States in said cause entitled "No. 312, October Term, 1923, etc.), and by the respondents' brief in reply thereto.

4. Your petitioner further urges upon the Court that the rule of stare decisis, and the rule that a decision upon a previous appeal becomes the law of the case upon a second appeal, does not apply herein, in that the questions submitted herein involve questions under the laws of the United States, as is held in 4 C. J. page 1101, Sec. 3083, and in the cases of American Ry. Exp. Co. vs. Davis, 250 S. W. 540, L. & N. R. Co. vs. Garnett, 96 So. 519, and your petitioner especially urges that in the matter of the jurisdiction of the State Court, and the error which it urges in denying its petition for removal, your petitioner respectfully submits:

(a) That this matter is controlled by the decisions of the Supreme Court of the United States in

Adams Exp. Co. vs. Croninger, 226 U. S. 491; 57 L. Ed. 314; 33 Sup. Ct. 148;
Kansas City So. Ry. Co. vs. Carl, 33 Sup. Ct. 391; 227 U. S. 639; 57 L. Ed. 683;
M., K. & T. Ry. Co. vs. Ward, 61 L. Ed. 1213; 37 Sup. Ct. 617; 224 U. S. 383.

holding that this suit arose under the acts of Congress to regulate commerce, as directly held in the quotations from said Croninger and

Carl cases referred to in the decision in M., K. & T. Ry. Co. vs. Ward, 37 Sup. Ct. 617 at 619, and cited in the petition for rehearing herein, [fol. 333] and set forth in appellant's brief as petitioner in said cause No. 312 before the Supreme Court of the United States, and that in its opinion herein, the Supreme Court of Montana was in error in citing in opposition to these cases nisi prius decisions of the trial Federal courts. That said cause was therefore removable under the case of

General Investment Co. vs. L. S. & M. S. Ry. Co., 43 Sup. Ct. 106.

(b) Moreover, said cause was removable on the ground of diversity of citizenship, as was held in the case of

Lee vs. C. & O. Ry. Co., 43 Sup. Ct. 230

and in the cases of

Tenn. vs. Bank, 152 U. S. 454; 14 Sup. Ct. 654;
Mexican Nat. Bank vs. Davison, 157 U. S. 201; 15 Sup. Ct. 563;
Cochran vs. Montgomery Co., 199 U. S. 260; 26 Sup. Ct. 58,

cited by the Supreme Court of Montana in its opinion, are expressly held in said General Investment Company case (43 Sup. Ct. p. 106 at p. 114, first paragraph) not to be in point; and the cases of Camp vs. Gress, and Smith vs. Lyon, cited by the Supreme Court of Montana, your petitioner respectfully submits are held in said General Investment Company case (43 Sup. Ct. 106 at 112, first paragraph) not to be in point.

(c) That this same question has arisen in other state courts since the said decision in said General Investment Company case and in said Lee case, and said state courts, on second appeals, have uniformly reversed their previous holdings on prior appeals and reversed the judgments appealed from, with directions to sustain the petition for removal.

American Ry. Exp. Co. vs. Davis, supra;
L. & N. R. Co. vs. Garnett, supra.

[fol. 334] 5. Your petitioner therefore respectfully submits that there is no occasion for reprinting the record herein, and that the record of said previous appeal may with propriety be used as its transcript on appeal in this appeal, supplemented by a certified copy of the remittitur filed in said District Court from said Supreme Court, together with a copy of an order substituting parties plaintiff of said judgment rendered May 15, 1924, and of the notice of appeal from said judgment, and that as the parties desire to expedite the hearing of this appeal, the Court should set aside the rules of procedure and accept as the transcript on appeal herein the said transcript on said former appeal, supplemented as aforesaid, and should use the transcript of the record of said cause No. 312, in the Supreme Court of the United States, the same constituting a true printed abstract of said transcript on said former appeal, together with said copies of said remittitur, order, judgment, and notice of appeal; and that there is no pany, et al., on Writ of Certiorari to the Supreme Court of the State of Montana," and thereafter the said Supreme Court of the United States dismissed said proceeding for want of jurisdiction, for that the said judgment of the Supreme Court of Montana was not a final judgment in said cause. That thereafter the Clerk of the Supreme Court of the State of Montana delivered said remittitur to the plaintiffs, and thereafter and on May 15, 1924, the said remittitur from said Supreme Court was duly filed in said District Court and cause by the plaintiffs. Thereupon, and within ten days thereafter, the plaintiffs duly gave their consent in writing to the reduction of said judgment in the sum aforesaid; and thereupon, and on the 15th day of May, 1924, judgment was duly rendered and entered in said District Court and cause in favor of the plaintiffs and against the defendant, for the sum of $19,665.90, and costs, nunc pro tunc as of December 17, 1920; that the defendant has served and filed in said District Court and cause a notice of appeal from said judgment, and it is the desire of the parties to said appeal that said appeal be expedited as much as possible consistent with due deliberation upon the issues thereby raised.

2. That with this object in view the said parties have signed a certificate and stipulation to a transcript on appeal, which said stipulation and certificate is self-explanatory.

3. That all questions raised upon this appeal have heretofore [fol. 332] been argued to the above entitled court, and are fully presented in the briefs filed by the appellant as petitioner in said Supreme Court of the United States in said cause entitled "No. 312, October Term, 1923, etc.), and by the respondents' brief in reply thereto.

4. Your petitioner further urges upon the Court that the rule of stare decisis, and the rule that a decision upon a previous appeal becomes the law of the case upon a second appeal, does not apply herein, in that the questions submitted herein involve questions under the laws of the United States, as is held in 4 C. J. page 1101, Sec. 3083, and in the cases of American Ry. Exp. Co. vs. Davis, 250 S. W. 540, L. & N. R. Co. vs. Garnett, 96 So. 519, and your petitioner especially urges that in the matter of the jurisdiction of the State Court, and the error which it urges in denying its petition for removal, your petitioner respectfully submits:

(a) That this matter is controlled by the decisions of the Supreme Court of the United States in

Adams Exp. Co. vs. Croninger, 226 U. S. 491; 57 L. Ed. 314; 33 Sup. Ct. 148;
Kansas City So. Ry. Co. vs. Carl, 33 Sup. Ct. 391; 227 U. S. 639; 57 L. Ed. 683;
M., K. & T. Ry. Co. vs. Ward, 61 L. Ed. 1213; 37 Sup. Ct. 617; 224 U. S. 383,

holding that this suit arose under the acts of Congress to regulate commerce, as directly held in the quotations from said Croninger and

Carl cases referred to in the decision in M., K. & T. Ry. Co. vs. Ward, 37 Sup. Ct. 617 at 619, and cited in the petition for rehearing herein, [fol. 333] and set forth in appellant's brief as petitioner in said cause No. 312 before the Supreme Court of the United States, and that in its opinion herein, the Supreme Court of Montana was in error in citing in opposition to these cases nisi prius decisions of the trial Federal courts. That said cause was therefore removable under the case of

General Investment Co. vs. L. S. & M. S. Ry. Co., 43 Sup. Ct. 106.

(b) Moreover, said cause was removable on the ground of diversity of citizenship, as was held in the case of

Lee vs. C. & O. Ry. Co., 43 Sup. Ct. 230,

and in the cases of

Tenn. vs. Bank, 152 U. S. 454; 14 Sup. Ct. 654;
Mexican Nat. Bank vs. Davison, 157 U. S. 201; 15 Sup. Ct. 563;
Cochran vs. Montgomery Co., 199 U. S. 260; 26 Sup. Ct. 58,

cited by the Supreme Court of Montana in its opinion, are expressly held in said General Investment Company case (43 Sup. Ct. p. 105 at p. 114, first paragraph) not to be in point; and the cases of Camp vs. Gress, and Smith vs. Lyon, cited by the Supreme Court of Montana, your petitioner respectfully submits are held in said General Investment Company case (43 Sup. Ct. 106 at 112, first paragraph) not to be in point.

(c) That this same question has arisen in other state courts since the said decision in said General Investment Company case and in said Lee case, and said state courts, on second appeals, have uniformly reversed their previous holdings on prior appeals and reversed the judgments appealed from, with directions to sustain the petition for removal.

American Ry. Exp. Co. vs. Davis, supra;
L. & N. R. Co. vs. Garnett, supra.

[fol. 334] 5. Your petitioner therefore respectfully submits that there is no occasion for reprinting the record herein, and that the record of said previous appeal may with propriety be used as its transcript on appeal in this appeal, supplemented by a certified copy of the remittitur filed in said District Court from said Supreme Court, together with a copy of an order substituting parties plaintiff of said judgment rendered May 15, 1924, and of the notice of appeal from said judgment, and that as the parties desire to expedite the hearing of this appeal, the Court should set aside the rules of procedure and accept as the transcript on appeal herein the said transcript on said former appeal, supplemented as aforesaid, and should use the transcript of the record of said cause No. 312, in the Supreme Court of the United States, the same constituting a true printed abstract of said transcript on said former appeal, together with said copies of said remittitur, order, judgment, and notice of appeal; and that there is no occasion for any transcript herein being printed or served. That acaccordingly appellant tenders herewith such printed transcript of the record in said cause No. 312 in the Supreme Court of the United States, and certified copies of said Remittitur, order, judgment, and notice of appeal.

6. That said cause may, with propriety, be set down for hearing and submitted as soon as possible upon said record, and upon the briefs filed by the appellant as petitioner in said cause No. 312 before said Supreme Court of the United States, and the reply brief of the respondents thereto, and upon such oral argument as the Court will permit, and that said cause should be set down for oral argument without prior briefs as soon as possible.

Wherefore, Your petitioner prays:

1. That the transcript on appeal filed in this Court upon said pre- [fol. 335] vious appeal, together with a copy of the remittitur from this Court to said District Court, a copy of said order and the copy of the judgment rendered herein pursuant to said remittitur on May 15, 1924, and a copy of the notice of appeal from said judgment, be declared the transcript on appeal herein, and that the printed transcript of the record in said cause No. 312 in said Supreme Court of the United States (constituting a correct abstract of said previous transcript on appeal), together with the copy of said remittitur, order, judgment and notice of appeal tendered herewith by the appellant and certified to by the attorneys, be taken as the transcript on appeal herein for the consideration of the Court, and that the same need not be printed or served.

2. That this case be set down for hearing and be deemed submitted to the Court without further briefs, other than the briefs of the said parties filed in said cause No. 312 in said Supreme Court of the United States, and upon such argument as the Court may permit, and upon such typewritten brief as respondent may file prior to the hearing.

3. For such other and further relief in the premises as to the Court may seem proper.

(Signed) I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover,
Attorneys for Petitioner.

[fol. 336] The respondents in the above entitled cause hereby consent to the granting of the foregoing petition, and if the same is granted, waive any service of said transcript on appeal; but the respondents deny the validity of the statements made in Paragraph 4 of said petition, and aver that the same are answered in respondents' reply brief in said cause No. 312 in the Supreme Court of the United States, and in the arguments heretofore made by the respondents in the Supreme Court of Montana, and will be further answered in a brief to be filed by respondents prior to the hearing.

(Signed) E. E. Enterline, J. W. Snellbacher, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 337]   IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER GRANTING PETITION TO SETTLE RECORD—Filed May 16, 1924

This cause coming on this day further to be heard upon the petition of Great Northern Railway Company to settle the record and to expedite the hearing herein, the respondents also having consented to the granting of said petition,

It is ordered, that said petition be, and the same hereby is, granted, and

1. That the transcript on appeal filed in this Court upon the appeal by Great Northern Railway Company from the judgment rendered by the District Court for Yellowstone County, Montana, dated December 17, 1920, in an action in said District Court numbered 7369, in favor of the plaintiffs and against the defendant, together with a copy of the remittitur from this Court, filed in said District Court and cause, a copy of the order substituting parties plaintiff, and a copy of the judgment rendered in said District Court pursuant to said remittitur, dated May 15, 1924, and a copy of the Notice of Appeal by said defendant Great Northern Railway Com- [fol. 338] pany from said judgment, be, and the same hereby is, accepted as the transcript on appeal herein, and that the printed transcript of said previous record in cause No. 312, October Term, 1923, in the Supreme Court of the United States (Great Northern Railway Company, Petitioner, vs. Galbreath Cattle Company et al., on Writ of Certiorari to the Supreme Court of the State of Montana), constituting a correct abstract of said transcript, together with a copy of said remittitur, order, judgment and notice of appeal, be, and the same hereby is, taken as an abbreviated transcript on appeal for the consideration of the Court, and that service and printing of any transcript on appeal herein is hereby dispensed with.

2. That this cause shall be, and the same hereby is, now submitted to this Court without further briefs, upon said printed abstract of said transcript on appeal (being the printed transcript of the record in said cause No. 312 in said Supreme Court of the United States), and upon said copy of said remittitur, order, judgment, and notice of appeal, and upon the briefs filed by said parties in said cause No. 312 in said Supreme Court of the United States, and upon the oral argument thereof to be made before the Court on the 10th day of June, 1924, on which date said appeal is set for hearing, and upon such further brief as the respondents may file before the said hearing.

Dated May 16, 1924.

By the Court.

(Signed) Lew. L. Callaway, Chief Justice.

[File endorsement omitted.]

[fol. 339] MINUTE ENTRY OF DECISION IN CAUSE NO. 5001

Wednesday, February 21st, 1923.

Court convened pursuant to recess:

Present: The Hon. Lew L. Callaway, Chief Justice; The Hon. Charles H. Cooper, Associate Justice; The Hon. Wm. L. Holloway, Associate Justice; The Hon. Albert J. Galen, Associate Justice; The Hon. Albert P. Stark, Associate Justice; Dana M. Easton, Clerk; M. N. Race, Marshal.

And the following proceedings were had:

5001

L. G. PHELPS et al., Respondents,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant

This cause came on for judgment and decision.

Whereupon, on consideration, it is now here ordered and adjudged by this Court that said cause be remanded to the district court of Yellowstone County with directions to grant a new trial unless within ten days after the filing of the remittitur the plaintiffs shall give their consent in writing that the judgment be reduced in the sum of $1,020. If such consent be given, the judgment will be modified accordingly as of the date of its original entry, and, together with the order denying the new trial will stand affirmed, each party to pay his own costs on appeal. Opinion by Mr. Justice Stark with all of the Justices concurring.

Lew. L. Callaway, Chief Justice.

Attest: Dana M. Easton, Clerk.

[fol. 340] IN SUPREME COURT OF MONTANA

[Title omitted]

SUBMISSISON OF CAUSE—June 10, 1924

This cause coming on this day to be heard, was argued to the court by counsel for the respective parties and submitted for judgment and decision.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 341] IN SUPREME COURT OF MONTANA

[Title omitted]

JUDGMENT—June 21, 1924

This cause this day came on for judgment and decision. Whereupon, on consideration it is now here ordered and adjudged by this court that the appeal in the above entitled cause be and the same is hereby dismissed at the cost of the appellant.

Opinion: Per Curiam.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 342] IN SUPREME COURT OF MONTANA

GALBREATH CATTLE COMPANY and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, etc., Plaintiffs and Respondents,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant and Appellant

[File endorsement omitted]

[fol. 343] OPINION PER CURIAM—Filed June 21, 1924

On a former appeal in this case (66 Mont. 198, 213 Pac. 610) the cause was remanded to the district court with directions to grant the defendant a new trial unless within ten days after the filing of the remittitur the plaintiffs should give their consent in writing that said judgment be reduced in the sum of $1,020, and if such consent was given, thereupon the original judgment should be modified accordingly as of the date of its entry and as so modified should stand affirmed. Subsequent to that decision a remittitur was issued from this court and within ten days after the same was filed in the district court, the plaintiffs elected to and did file a written consent to the reduction of the original judgment in the sum of $1,020, whereupon a judgment for the reduced amount was duly entered in the district court, and from that judgment the defendant has appealed to this court.

We cannot entertain this appeal. The judgment entered by the district court under the mandate of our former decision, in effect became the judgment of this court. The district court has no discretion in the matter. It could give no relief other than that which was specifically pointed out to it.

In Kimpton v. Jubilee Min. Co., 16 Mont. 379, 41 Pac. 137, the judgment appealed from was reversed and the cause remanded to the district court with directions to enter a specific judgment in favor of the plaintiffs. In accordance therewith such a judgment was entered in the district court and from it the defendants appealed. When this latter appeal came to be heard this court declined to con- [fol. 344] sider it and ordered the same dismissed (22 Mont. 107, 55 Pac. 918), for the reason that it was in effect an appeal to this court from its own judgment. The same principle applies here. When the plaintiffs filed their written consent to the reduction of the original judgment in the sum of $1,020 the district court had nothing to do except modify the judgment as directed by this court. This it did, and the judgment as so modified stood affirmed and was in effect the judgment of this court.

On the authority of Kimpton v. Jubilee Min. Co., supra, we think the appeal in this case should be dismissed, and it is so ordered.

Dismissed.

[fol. 345] IN SUPREME COURT OF MONTANA

ORDER CORRECTING TITLE OF OPINION FILED IN 5542—Filed June 27, 1924

[Title omitted]

It is ordered that the title of the opinion in this cause read:

L. G. Phelps (Annice W. Phelps and Frances P. Belden, as Executrices, and Eugene Phelps, as Executor of the Last Will and Testament of L. G. Phelps, deceased, being substituted in lieu of L. G. Phelps, deceased) and Galbreath Cattle Company, a corporation, Plaintiffs and Respondents, vs. Great Northern Railway Company, a corporation, Defendant and Appellant, instead of Galbreath Cattle Company and Annice W. Phelps and Frances P. Belden, as Executrices etc., Plaintiffs and Respondents, vs. Great Northern Railway Company, a corporation, Defendant and Appellant, and that the title page of the opinion be amended accordingly.

(Signed) Lew. L. Callaway, Chief Justice.

Attest: (Signed) J. W. Crosby, Clerk.

[fol. 346] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER STAYING REMITTITUR

This cause comong on this day regularly to be heard, upon consideration of the foregoing petition, and upon motion of I. Parker Veazey, Jr., counsel for the appellant, Great Northern Railway Company:

It is hereby ordered that the remittitur in the above entitled cause shall not issue herein, but shall be stayed until the 20th day of July, 1924, and if on or before that date there shall be filed with the Clerk of this Court an affidavit of counsel for said appellant, showing that a petition for a Writ of Certiorari has been filed by said appellant in the Supreme Court of the United States to review the judgment of the Supreme Court of the State of Montana, or the judgment of the District Court for Yellowstone County, Montana, in said petition referred to, then the remittitur herein shall be held for a further period thereafter and shall not issue before final disposition shall be [fol. 347] made by the Supreme Court of the United States of the petition for said writ, and if the same shall be granted, until the final disposition of said proceedings in certiorari by the Supreme Court of the United States.

Dated June 28, 1924.

(Signed) Lew. L. Callaway, Chief Justice.

[fol. 348] IN SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR ORDER STAYING REMITTITUR

To the Honorable the Supreme Court of the State of Montana and its Justices:

The petition of Great Northern Railway Company, appellant herein, respectfully represents:

1. That on the 21st day of June, 1924, this Court rendered and passed its judgment in the above entitled cause, in and by which said judgment the Court dismissed the appeal herein, on the ground that the judgment rendered by the District Court appealed from herein was rendered by said Court pursuant to the mandate of the Supreme Court of Montana upon a former appeal to said Supreme Court of Montana, in a cause in said Supreme Court numbered 5001, in which said last mentioned cause the Court held that it was not error in the trial court to deny to the appellant the removal of said cause to the United States District Court for the District of Montana, and otherwise your petitioner conceives that it has been deprived of Federal rights, and your petitioner desires that the Su- [fol. 349] preme Court of the United States be asked to pass finally upon these questions, and said questions are such that they can be determined, and said judgment of the Supreme Court of Montana reviewed by the Supreme Court of the United States, only in its discretion, by a petition for a Writ of Certiorari. That under the statutes of Montana the dismissal of said appeal is an affirmance of said judgment, and said judgment of the District Court for Yellowstone County, Montana, appealed from in said cause No. 5542, can be reviewed by the Supreme Court of the United States by a Writ of

Certiorari directed to the Supreme Court of Montana to review its said judgment dismissing said appeal.

Merrill v. National Bank, 173 U. S. 131; 43 L. Ed. 640.

2. That the Act of Congress and the rules of the Supreme Court of the United States fix the time within which said petition for a Writ of Certiorari may be filed therein, at three months; and it is further provided by the rules of the Supreme Court of the United States that the party making application for said writ shall, as a part of such application, furnish the Court with a certified copy of the whole record, and that thirty printed copies of the petition for the writ, and the brief in support thereof, shall be filed, and that notice of the date of the submission of the petition, together with a copy of the brief and petition aforesaid shall be served on counsel for the respondents at least three weeks before such date for the submission of said petition.

3. That your petitioner is prepared to perfect the record in this case and will, on or before the 20th day of July, 1924, file its petition for a Writ of Certiorari from said Supreme Court of the United States to the Supreme Court of Montana, and to the District Court [fol. 350] for Yellowstone County, Montana, to review said judgment of said Supreme Court of Montana and said judgment of the District Court for Yellowstone County, and with this end in view is engaged in the preparation of said petition, the printing of which has been almost completed, and your petitioner is applying to the Clerk of the Supreme Court of Montana for a transcript of said record, and your petitioner is proceeding, and will proceed with said application with due diligence.

4. That your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of said petition for said writ, an order of this Court is required to stay the issuing of a remittitur herein.

Wherefore, your petitioner prays that this Court enter an order directing the Clerk of this Court to hold the remittitur in this cause pending the filing of the aforesaid petition in the Supreme Court of the United States, until the 20th day of July, 1924, and that if said petition shall be filed in said Supreme Court of the United States on or before that day, the remittitur hereunder shall be further held until the Supreme Court of the United States shall act upon said petition, and if it shall grant the same, until said judgment shall be finally reviewed by said Supreme Court of the United States.

(Signed) I. Parker Veazey, Jr., W. L. Clift, and R. H. Glover,
Attorneys for Petitioner, Great Falls, Montana.

[fol. 351] Jurat showing the foregoing was duly sworn to by I. Parker Veazey; omitted in printing.

[fol 352.] In Supreme Court of Montana

Clerk's Certificate

The undersigned, as Clerk of the Supreme Court of the State of Montana, does hereby certify and declare that attached hereto is a full, true and correct copy of the following original papers, entries and documents as the same appear of record in the office of the undersigned as such Clerk, in that certain cause filed in said Supreme Court on appeal and entitled "L. G. Phelps, et al., Respondents vs. Great Northern Railway Company, Appellant, Cause No. 5001" (being the first appeal by said appellant), or in that certain cause filed in said Supreme Court on appeal and entitled "L. G. Phelps (Annice W. Phelps and Frances P. Belden, as Executrices, and Eugene Phelps, as Executor of the Last Will and Testament of L. G. Phelps, deceased, being substituted in lieu of L. G. Phelps, deceased), and Galbreath Cattle Company, a corporation, Respondents, vs. Great Northern Railway Company, a corporation, Appellant, Cause No. 5542," (being the second appeal by said appellant) as indicated, to-wit:

1. A copy of the transcript on appeal filed by the appellant in said Cause No. 5542 and certified by the attorneys for the respective parties as correct, as permitted by Section 9746 of the Revised Codes of Montana, and a copy of said certificate and stipulation of the attorneys to said transcript on appeal (which said transcript is a copy of the printed transcript in the Supreme Court of the United States in a cause filed therein entitled "Great Northern Railway Company, [fol. 353] Petitioner, vs. Galbreath Cattle Company et al., No. 312, October Term, 1923, No. 29581" on a Writ of Certiorari to the Supreme Court of Montana, being a printed copy of the transcript of the record of said cause in the Supreme Court of Montana upon said first appeal, entitled L. G. Phelps, et al., vs. Great Northern Railway Company, Appellant, No. 5001; which said transcript was lately, on the 14th day of April, 1923, certified by the Clerk of said Supreme Court of Montana, and is the transcript referred to in his return to said Writ of Certiorari under date of July 30, 1923; which said printed transcript exhibits the proceedings in said cause in said Supreme Court of Montana up to the time of said Writ of Certiorari; which said transcript is also supplemented by the proceedings had in the District Court for Yellowstone County, Montana, since the remittitur from said Supreme Court of Montana in said cause No. 5001 was filed in said District Court; and embracing the remittitur from said Supreme Court of the State of Montana in said cause No. 5001, the order for a change of parties plaintiff in said cause filed in said District Court, and the judgment of the district court for Yellowstone County, Montana, entered pursuant to said remittitur on the 15th day of May, 1924.

2. The petition of said appellant filed in said cause No. 5542 in the Supreme Court of Montana to advance said cause, and to settle the record therein; which said petition was filed in said Supreme

Court of the State of Montana on May 16, 1924, and the order of said Supreme Court of Montana, made on said day, granting said petition.

3. A copy of the minute entry of the decision of said Supreme Court of the State of Montana upon said former appeal in said cause No. 5001; a copy of the judgment and opinion (the same being in one instrument), of said Supreme Court of Montana on said former [fol. 354] appeal, being found on pages 266 to 277 of said transcript.

4. A copy of the minute entry of said Supreme Court submitting said second appeal, being said cause No. 5542, to said Supreme Court of the State of Montana.

5. A copy of the Opinion and judgment of the Supreme Court of the State of Montana in said cause No. 5542 dismissing said second appeal, which said opinion and judgment are embraced in one document; the said opinion with its accompanying decision and directions constituting when filed the judgment of said Supreme Court of the State of Montana.

6. A copy of the minute entry of the decision of said Supreme Court of the State of Montana upon said second appeal, being the said cause No. 5542.

7. A copy of the minute entry correcting the title of the opinion filed in said cause 5542.

8. A copy of appellant's petition asking for a stay of the remittitur in said cause No. 5542, and the order of the court pursuant to said petition, staying said remittitur; which said papers constitute a full, true and correct copy of the entire transcript of the record of said cause No. 5542 in said Supreme Court of the State of Montana, including all proceedings in said Supreme Court of the State of Montana.

In witness whereof, the undersigned has hereunto set his hand and affixed the seal of said Supreme Court of the State of Montana, this 2nd day of July, A. D. 1924.

J. W. Crosby, Clerk of the Supreme Court of the State of Montana. (Seal of Supreme Court, State of Montana.)

[fol. 355] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

ORDER GRANTING PETITION FOR CERTIORARI—October 20, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of the State of Montana, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

FILED
JUL 15 1924
WM. R. STANSBURY
CLERK

No. [redacted] 1138

IN THE

Supreme Court of the United States

October Term, [redacted] 1925

271

/13

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

VS.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN as Executrices and EUGENE PHELPS as Executor of the Last Will and Testament of L. G. PHELPS, deceased, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA WITH ACCOMPANYING BRIEF AND NOTICE OF THE DATE OF SUBMISSION OF SAME

I. PARKER VEAZEY, Jr.,
Great Falls, Montana,
Attorney for Petitioner.

F. G. DORETY,
St. Paul, Minnesota,
Of Counsel.

Filed..

....
Clerk.

IN THE

Supreme Court of the United States

October Term, 1923

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

vs.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN as Executrices and EUGENE PHELPS as Executor of the Last Will and Testament of L. G. PHELPS, deceased, Respondents.

NOTICE OF THE DATE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To the Respondents in the above entitled cause; and
To E. E. Enterline, Esq., Casper, Wyoming, and
To J. S. Snellbacker, Esq., Billings, Montana, as Attorneys for said Respondents:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE: That, upon the annexed petition of Great Northern Railway Company, and a certified copy of the entire transcript of the record of the case in said petition referred to, including the proceedings in the Supreme Court of Montana therein referred to, submitted with said Petition, and the petitioner's brief in support of said petition, an application will be made to the Supreme Court of the United States, at a term of said Court to be held at Washington, D. C., on Monday, the 6th day of October, 1924, at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, for a Writ of Certiorari to be directed to the Supreme Court of Montana, and to the District Court for Yellowstone County, Montana, as in the annexed petition prayed.

F. G. DORETY,
I. PARKER VEAZEY, Jr.,
Attorneys for Petitioner.

143930

IN THE

Supreme Court of the United States

October Term, 1923

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

VS.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices and EUGENE PHELPS as Executor of the Last Will and Testament of L. G. PHELPS, deceased, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA, AND TO THE DISTRICT COURT FOR YELLOWSTONE COUNTY, MONTANA.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

GREAT NORTHERN RAILWAY COMPANY, the petitioner above named, in support of this your petitioner's petition for a Writ of Certiorari to review a certain judgment rendered by the Supreme Court of the State of Montana, and a judgment rendered by the District Court for Yellowstone County, Montana, respectfully represents:

1. That the Supreme Court of Montana, in a cause in said Court numbered 5001, and entitled L. G. PHELPS and GALBREATH CATTLE COMPANY, respondents, vs. G. N. RY. CO., appellant, reviewed a

judgment of the District Court for Yellowstone County, Montana, rendered on the 17th day of December, 1920, awarding to the respondents, as plaintiffs in said trial Court, $20,685.90 as compensation for damages claimed to have been sustained to their cattle in an interstate transit from Cody, Wyoming, to Seville, Montana, and the said Supreme Court did, on the 21st day of February, 1923, determine said appeal and did render and pass its judgment that said cause be remanded to the District Court for Yellowstone County with directions to grant a new trial unless the plaintiff would file in the Court below a modification of said judgment by reducing the same in the sum of $1,020.00, and directing that upon said consent being filed the said judgment should be modified accordingly, and as modified should be affirmed, and defendant denied a new trial. That thereupon your petitioner petitioned the Supreme Court of the United States for a writ of certiorari to review said judgment of the Supreme Court of Montana, and said respondents objected to said petition as premature because said judgment of said Supreme Court was not a final judgment in that, in form, it granted a new trial; but said Supreme Court of the United States granted said petition and said cause was docketed as cause No. 29581, Oct. Term, 1923, No. 312, and the record therein was printed and is on file in said Court. That, however, upon said cause coming on for argument in said Supreme Court of the United States, it was ruled that said writ was issued prematurely and that said judgment was not a final judgment, and accordingly said decision of said Supreme Court of Montana could not be reviewed until further proceedings were had in said cause, and said proceeding was, therefore, dismissed.

2. That thereafter, upon the receipt of the Mandate from the Supreme Court of the United States, the Supreme Court of the State of Montana delivered to the plaintiffs its remittitur to said District Court for Yellowstone County, commanding said Court to grant a new trial as aforesaid unless the plaintiffs would file said consent to said modification, and thereupon, and on the 15th day of May, 1924, the plaintiffs filed said remittitur in said District Court, and at the same time filed their consent to said modification, and *thereupon, on May 15, 1924, the said District Court* for the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, *rendered* and entered *its judgment* in favor of the plaintiffs and against the defendant as conditionally directed by said Supreme Court of Montana. That thereupon, the defendant appealed to the Supreme Court of Montana from said judgment, at the same time filing in said Supreme Court a petition for the advancement of said cause, which was granted, and thereupon, and on June 10, 1924, said cause was submitted (entitled L. G. Phelps (Annice W. Phelps and Frances P. Belden as Executrices and Eugene Phelps as Executor of the Last Will and Testament of L. G. Phelps, deceased, being substituted in lieu of L. G. Phelps, deceased) and Galbreath Cattle Company, respondents, vs. G. N. Ry Co., appellant, No. 5542) to said Supreme Court of Montana upon the briefs filed in said cause No. 312, Oct. Term, 1923, in the Supreme Court of the United States, and upon oral argument by counsel, and *thereafter,* and

on the 21st day of June, 1924, said Supreme Court of Montana rendered its judgment dismissing said appeal for want of jurisdiction for that no appeal would lie from said judgment so entered pursuant to its directions, thereby under the Statutes of Montana (Sec. 9748 Revised Codes of 1921) in effect *affirming said judgment.*

3. That in order *to avoid any question of practice, this petition asks for a Writ of Certiorari to said District Court* for the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, *to review its said judgment rendered on May 15, 1924, and directed also to said Supreme Court of the State of Montana to review its judgment rendered on the said 21st day of June, 1924,* though it would seem sufficient for the Writ to run to the Supreme Court alone, and the petition is filed within three months after the date of the trial Court's judgment.

4. That said judgment, so rendered and passed by the Supreme Court of said State of Montana, was a final judgment in said suit in the highest Court of the State of Montana in which a decision in said suit could be had, or, if not a judgment, then said judgment of said District Court for Yellowstone County was a final judgment in said suit in the highest Court in the State of Montana, in which a decision could be had; and, in said cause, certain rights, privileges, and immunities were claimed by your petitioner under the constitution and statutes of the United States, and the decision in said cause was, in one instance, against one of said rights, privileges, and immunities, and, in another instance, in form in favor of, but in effect

against, another of said rights, privileges, and immunities so especially set up and claimed by your petitioner under the constitution and statutes of the United States, as hereinafter set forth.

A.

THE COURT HAS ALREADY HELD THAT A WRIT OF CERTIORARI SHOULD BE GRANTED HEREIN.

Attention should be called in this petition to the fact that *the Court has already held that petitioner is entitled to a Writ of Certiorari herein* (G. N. Ry. Co., petitioner, vs. Galbreath Cattle Co., 262 U. S. 740; 66 L. Ed. 1209; 43 S. C. 702). Upon the hearing, however, this Court held the petition premature (G. N. Ry. Co., petitioner, vs. Galbreath Cattle Co., ... U. S. ......; 68 L. Ed. 387; 44 S. C. 344.) *The record of this case has been printed in cause No. 312, Oct. Term, 1923, and the later proceedings have now been had in conformity to the ruling of the Supreme Court of the United States* as to what should be done before the judgment would become final *so that said cause could be reviewed by that Court.*

With this object in view the Supreme Court of Montana, on petition of petitioner, concurred in by respondents, *cut short all rules of procedure, advanced the cause* for hearing, *and adopted as its transcript* on the second appeal *a copy of the record printed by the Clerk of the Supreme Court of the United States* in said cause No. 312, Oct. Term, 1923, supplemented by the later proceedings in the trial Court; *and* the parties and the Montana Supreme Court adopted *the briefs filed* in said cause *in said Supreme Court of the United*

States to the end that the party against whom the decision might be rendered could obtain a review at as little expense as possible, and said Supreme Court of Montana, after argument, having declined to modify or re-examine its former ruling, *said cause has now been shaped for review by the Supreme Court of the United States* in accordance with its decision in said former proceeding in certiorari requiring further proceedings in the State Court.

The entire record has been printed by the Clerk of the Supreme Court of the United States, *the printed briefs* in said cause No. 312, *are on file* and, upon the writ being granted, said cause could be advanced for immediate hearing upon the said record and briefs already on file.

B.

DENIAL OF RIGHT OF REMOVAL TO THE UNITED STATES COURT

Your petitioner duly filed in the trial Court a petition for the removal of the case to the United States District Court (Transcript pp. 6 to 8), on the ground that the complaint (Transcript pp. 1 to 5) showed that the case arose under the laws of the United States and, indeed, being a case to recover alleged damage to cattle in an interstate shipment, it arose under the federal laws regulating commerce and, secondly, on the ground that it arose between citizens of different States, in that the defendant was a Minnesota citizen and one of the plaintiffs was a Wyoming citizen, and the other plaintiff was a Montana citizen. THE TRIAL COURT found the right of removal properly preserved but RULED THAT THE CASE DID NOT

ARISE UNDER THE COMMERCE LAWS AND THAT THERE WAS NOT SUFFICIENT DIVERSITY OF CITIZENSHIP, AS A MATTER OF VENUE, FOR THE SUIT TO BE ORIGINALLY BROUGHT IN THE FEDERAL COURT AND, THEREFORE, THE COURT DENIED REMOVAL. (Transcript pp. 8 to 9.) THE SUPREME COURT overruled defendant's exception and sustained the denial of the right of removal, and DECLINED TO FOLLOW THE CONTROLLING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *General Investment Company vs. Lake Shore and Mich. S. Ry. Co.*, 43 Sup. Ct. 106, and in *Lee vs. Ches. & O. Ry. Co.*, 43 Sup. Ct. 230, AND HELD THAT THESE DECISIONS were not controlling or applicable and DID NOT AFFECT other decisions such as SMITH VS. LYONS, 133 U. S. 315, and CAMP VS. GRESS, 250 U. S. 308, AND THAT, therefore, THE VENUE PROVISIONS, of the Federal laws, DEFINING ORIGINAL JURISDICTION so-called, STILL CONTROL JURISDICTION ON REMOVAL, contrary to the clear and express declarations of the said recent controlling decisions of this Court. Said Supreme Court also ruled that this cause did not arise under the commerce laws of the United States, thereby declining to follow the decisions of this Court in C. & N. W. Ry. Co. v. Whitnock, 42 Sup. Ct. 328; M. K. & T. Ry. Co. vs. Ward, 37 Sup. Ct. 617 at 619, 244 U. S. 383, and in the case of the So. Pac. Co. vs. Shewart, 245 U. S. 359, 38 Sup. Ct. 130; 245 U. S. 562; 38 Sup. Ct. 301; Penn. Ry. Co. vs. Olivit Bros., 243 U. S. 574; 37 Sup. Ct. 468; Kans.

City So. Ry. Co. vs. Carl, 227 U. S. 639; 33 Sup. Ct. 391. A DENIAL OF A WRIT OF CERTIORARI IN THIS INSTANCE WOULD THUS THROW THE ENTIRE LAW OF REMOVAL INTO CONFUSION AND THE GRANTING OF THE WRIT IS NECESSARY TO SECURE FOR DEFENDANT THIS FEDERAL RIGHT OF REMOVAL WHICH HAS BEEN DENIED TO IT IN THE VERY FACE OF THESE CONTROLLING DECISIONS.

A writ of certiorari has just been acted upon in another case (Central Co. vs. Ocepek, 43 Sup. Ct. 361), to give the relief here asked.

B.

DENIAL OF OTHER FEDERAL RIGHTS, ETC.

It is somewhat unsatisfactory to present as a ground of reversal a single procedural question of jurisdiction alone, and hence your petitioner asserts ADDITIONAL GROUNDS FOR ASKING THE WRIT herein prayed showing how in other respects your petitioner has been unjustly deprived of further Federal rights.

Thus, in the first place, (a) there was

> *A Denial of Duty on the Shipper to unload, feed, water and rest cattle in an interstate shipment and placing this duty on the carrier, contrary to the Federal Statute.*

THE TRIAL COURT, in its instructions to the jury, REFUSED INSTRUCTIONS No. 27 and 27-A (Tr. pg. 258) requested by defendant, GIVING EFFECT TO THE STATUTES OF THE UNITED STATES (Sec. 8651 Comp. Sts. of 1918) AND the provisions of THE INTERSTATE BILL OF LADING governing this interstate shipment, whereby the duties connected with the unloading and caring for the animals in transit would normally rest on the shipper and instructed the jury (Tr. pp. 246 to 248) that this duty, under the circumstances named, rested on the carrier.

The Instructions refused read as follows:

No. 27:

> "You are instructed that under the law the obligation to unload and reload the cattle in transportation rested upon the shippers and not upon the railway company and that therefore the railroad company is not under any obligation to furnish for the purpose of unloading or reloading the cattle in question expert help in that regard, and that plaintiffs cannot complain in this action because the men who assisted in the unloading and reloading were not expert cattle men." (Tr. p. 258.)

No. 27 A:

> "You are instructed that aside from doing the actual details of the unloading, loading or care of the cattle in transit the duty of supervising said unloading, loading and care rested primarily upon the plaintiffs and their agents, and they cannot recover for damages, if any, caused by negligence, if any, on their part in not properly supervising said unloading, loading or care (aside from doing the actual details of the same) or to which their said negligence, if any, contributed as a cause." (Tr. p. 258.)

THE SUPREME COURT OF MONTANA, in its decision (p. 272 to 275) HOLDS THAT IT WAS ERROR TO REFUSE THESE REQUESTED INSTRUCTIONS concerning a vital matter in the cause reasonably exerting a controlling influence on the jury (See testimony: Original Exhibit 1; Tr. p. 73, l. 18, to p. 74, l. 5; p. 552, ll. 5 to 18; p. 57, l. 21, to p. 58, l. 19; p. 59, ll. 13 to 24; p. 60, ll. 10 to 20; p. 83, ll. 5 to 9; p. 86, l. 23, to p. 87, l. 8; p. 87, ll. 21 to 26; p. 88, l. 29, to p. 89, l. 23; p. 93, ll. 16 to 20; p. 261, l. 10, to p. 265, l. 4; p. 261 to 264), AND THEREBY RULED IN FAVOR OF THE FEDERAL RIGHT CLAIMED BY YOUR PETITIONER AS DEFENDANT BUT THE SUPREME COURT, after ruling that the trial Court denied defendant a Federal right and after upholding the Federal right, DECLINED TO GIVE EFFECT TO THIS FEDERAL RIGHT FOR, instead of reversing the judgment so grounded upon this denial of a federal right, THE COURT UPHOLDS THE JUDGMENT SO ERRONEOUSLY GROUNDED NOTWITHSTANDING THIS ERROR. The Supreme Court, in effect, thus denies the Federal right.

(b)

Imposing Burden of Proof on Carrier Where Shipper Accompanies Stock.

The trial Court placed the burden of proof in this action upon the carrier (Instruc. 5; Tr. p. 244 to 245) notwithstanding this was an interstate shipment and the shipper's caretaker accompanied the shipment, whereas, under the Federal Law, the burden would be on the shipper. The Supreme Court upheld this action of the trial Court on the ground that the interstate character of this shipment was defeated by this being an action against the terminal carrier, and hence the exceptional Montana rule (Nelson v. G. N. Ry. Co., 28 Mont. 297; 72 Pac. 642) on the burden of proof applied, and thereby the Supreme Court denies your petitioner, as a terminal carrier in an interstate shipment moving under a bill of lading issued by the initial character, a Federal right. Thereby the Court misunderstood the effect of the case of M. K. & T. Ry. Co. vs. Ward and other cases infra, and many decisions to the effect that in interstate shipments the burden is on the shipper whose caretaker accompanies the shipment:

> Berry v. C. & A. Ry. Co., 208 S. W. 622 at 623;
> Baker v. Schaff, 211 S. W. 103 to 104;
> Bland v. C. & A. Ry. Co., 232 S. W. 268;
> Neely v. Hines, 227 S. W. 650,

and those decisions holding that the matter of the burden of proof is a matter of substance and not of procedure (So. Pac. Ry. Co. vs. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469) and thus a review of said judgment is necessary in order to clarify the law as to the nature of this kind of case and as to the burden of proof in this kind of suit.

Your petitioner further says that it has no right of appeal or to a writ of error from this Honorable Court, and said errors can be corrected only by the writ herein prayed.

It would seem that it would be sufficient that the Writ of Certiorari be directed to the Supreme Court of Montana alone as that Court alone has the entire record (the record of the District Court and its own record of proceedings subsequent to the appeal), and under the Montana Code (Revised Codes of 1921, "Sec. 9748: The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from") the decision of the Supreme Court of Montana on the second appeal declining to re-examine its former decision on these federal questions, is, as far as further review is concerned, a decision affirming the judgment below and, therefore, it is that judgment which constitutes the judgment of the highest court of the State.

Your petitioner furnishes and presents herewith as an exhibit marked "Exhibit A" to this petition, a certified copy of the entire record of said case including the proceedings in the Supreme Court of the State of Montana.

WHEREFORE, Your petitioner prays that this Court require that there be certified to it for review and determination the cause aforesaid and that, to this end, a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Montana, and to the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, commanding said Courts to certify and send to this Court, on a day therein to be designated, a full and complete transcript of the record of its proceedings and that said judgment of said Supreme Court of Montana, and of said District Court for Yellowstone County may be reversed, and that your petitioner may have such other and further relief or remedy in the premises as to the Court may seem appropriate.

F. G. DORETY,
St. Paul, Minnesota,
and
I. PARKER VEAZEY, JR.,
Great Falls, Montana,
Attorneys for Petitioner.

UNITED STATES OF AMERICA }
STATE OF MONTANA } SS.
COUNTY OF CASCADE }

I. Parker Veazey, Jr., being first duly sworn on oath, deposes and says: That he is one of the Attorneys of record for the Petitioner named in the foregoing petition and its Attorney of record in personal charge in the trial Court and in the Supreme Court of the State of Montana of the proceedings named in said petition and makes this affidavit for and on its behalf (for the reason that said petitioner is a corporation and no officer of said corporation is in the County of Cascade or the State of Montana, and no officer or agent of said corporation knows the truth of the facts therein stated better than affiant.) That the statements made in said petition are true to the best of affiant's information and belief, based as aforesaid from personally conducting said proceedings and from an examination of the records thereof. That this petition is made and presented in good faith and not for delay.

I. PARKER VEAZEY, JR.

Subscribed and sworn to before me this......3.........day of.......July........, A. D. 1924.

W. L. CLIFT,

Notary Public in and for the State of Montana, residing at Great Falls, Cascade County, Montana. My Commission expires Nov. 29th, 1924.

IN THE

Supreme Court of the United States

October Term, 1923.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

vs.

GALBREATH CATTLE COMPANY, et. al., Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The argument, especially on the removal feature, will be brief and only sufficient to outline more clearly the errors urged. *This brief is in effect merely a copy of the brief previously filed upon which a Writ of Certiorari was granted. A more detailed, complete, brief is on file in cause No. 312, October Term, 1923,* which would be adopted here except that extra copies may have been destroyed.

A.

DENIAL OF REMOVAL TO FEDERAL COURT.

As to the right of removal was seasonably urged, all further proceedings were without jurisdiction and void:

B. & O. R. Co. vs. Koontz, 104 U. S. 5; 26 L. Ed. 643;
Gordon vs. Longest, 10 L. Ed. 900; 4k U. S. 97;
Goldey vs. Morning News, 156 U. S. 518; 16 Sup. Ct. 509; 39 L. Ed. 517;
Kanouse vs. Martin, 14 L. Ed. 660; 56 U. S. 198;
National Steamship Co. vs. Tugman, 106 U. S. 118; 1 Sup. Ct. 58; 27 L. Ed. 87;

Powers vs. Chesapeake & O. R. Co., 169 U. S. 92; 42 L. Ed. 673; 18 Sup. Ct. 264;
Kern vs. Hindekoper, 103 U. S. 485; 26 L. Ed. 354;
Home Life Insurance Co. vs. Dunn, 22 L. Ed. 68; 86 U. S. 214;
Marshall vs. Holmes, 141 U. S. 589; 12 Sup. Ct. 62; 35 L. Ed 870.

THOUGH THE ENTIRE RECORD IS VOLUMINOUS, THE PERTINENT PORTIONS ON THE REMOVAL FEATURE ARE INVOLVED IN A FEW PAGES. This would include the complaint (pp. 1 to 5) and the removal proceedings (pp. 5 to 9).

First, as regards the case as arising under the Commerce Laws:

The Complaint showed an attempt to collect some $45,000 damages sustained to cattle in transit from Cody, Wyoming, on the Burlington Railroad, through the junction with the railroad of the Great Northern, your Petitioner, at Mossmain, Montana, to Seville, Montana, the action being brought against the terminal carrier over whose line it is alleged the damage occurred. The Plaintiffs claim that the interstate nature of the shipment or that any reliance on the Federal law did not appear in the complaint comes with poor grace, as the complaint alleged that the Burlington issued a through bill of lading on which the shipment was moved (page 2), and a new live stock contract issued by the Great Northern at Mossmain was excluded, when offered in evidence, on the ground that the original contract completely controlled the entire movement (pp. 31 to 34) and the complaint charged confinement in cars, and a 36 hour lease governed the movement (p. 34), and the plaintiffs also obtained a ruling that the interstate character of the shipment made void the limitation of value provided in the contract (p. 248).

As the shipment originated in Wyoming and was destined to Montana, though the terminal carrier movement was wholly in Montana, the liability was controlled by the Federal law, which made the original contract controlling to destination, and imposed the duties and liabilities of the 28 hour law regarding unloading and resting, and made void the limitation as to value. The following authorities show that such a suit arises under the laws of the United States:

Adams Express Company vs. Croninger, 226 U. S. 491; 57 L. Ed. 314; 33 Sup. Ct. 148;
Kas. City So. Ry. Co. vs. Carl, 33 Sup. Ct. 391; 227 U. S. 639; 57 L. Ed. 683;
G. F. & A. R. Co. vs. Blish Milling Co., 241 U. S. 190; 60 L. Ed. 948; 36 Sup. Ct. 541;
C. & N. W. Ry. Co. vs. Whitnack Co., 42 Sup. Ct. 328; 258 U. S. 369; 66 L. Ed. 665;
O. W. R. & N. Co., vs. McGinn, 42 Sup. Ct. 332; 258 U. S. 409; 66 L. Ed. 689;
M. K. & T. Ry. Co. vs. Ward, 37 Sup. Ct. 617; 244 U. S. 383; 61 L. Ed. 1213;
Penn. Ry. Co. vs. Olivit, 37 Sup. Ct. 468; 243 U. S. 574; 61 L. Ed. 908;
C. & W. C. R. Co. vs. Varnville Furn. Co., 237 U. S. 577; 59 L. Ed. 1137; 35 Sup. Ct. 715.

In opposition the Supreme Court of Montana cited, in its opinion, only two nisi prius decisions.

As the case arose under the Federal law, and, indeed, under the Commerce Laws, jurisdiction was conferred, as asserted in Petition for Removal, by the 8th subdivision of Section 991 of the Compiled Statutes, and removal was proper to the Federal Court of Montana irrespective of the venue provisions regarding suits originally brought in the Federal Court. The case of

> General Investment Co. vs. Lake Shore & M. S. Ry. Co., 43 Sup. Ct. 106

is controlling.

But the Supreme Court ignored this decision, in its original opinion, on the ground that that case arose under the Federal Law, but that the present case did not, and the Court declined to heed the language of the General Investment case which was applicable to all removal cases.

However, diversity of citizenship was also urged as a ground of removal and hence, after the argument, to escape this threatened distinction being urged further, the case of

> Lee vs. Ches. & O. Ry. Company, 43 Sup. Ct. 230,

was cited to the Court but this case too was not heeded and, when pressed upon the Court in the Petition for Rehearing, the Court amended its Opinion by adding a paragraph that these two cases did not overrule

> Smith vs. Lyons, 133 U. S. 315, and
> Camp vs. Gress, 250 U. S. 308.

The cases of Smith vs. Lyons and Camp vs. Gress are, however, cases originally brought in a Federal Court, and it is held that the venue provisions in regard to suits originally brought require that jurisdiction shall be denied if any plaintiff or defendant is not a resident of the district where the suit is brought. The old provision of the law was that, as regards diverse citizenship, the suit must be between a citizen of the State where suit is brought and a citizen of another

State, but Camp vs. Gress expressly says that the Act of 1887-8 (and the Judicial Code) "did not restrict jurisdiction based on diversity of citizenship in those cases where the venue is determined by the residence of the plaintiff." In those two cases it is clear that the Court is considering, not jurisdiction of the subject matter, but venue rights of the parties, which they may waive, and the question as to whether there was a waiver was argued.

Of course, as stated by the Supreme Court of Montana, the General Investment case and the Lee case do not affect the cases of Smith vs. Lyons or Camp vs. Gress, for the two latter cases concern only venue in cases originally brought in Federal Courst, while the two former concern only venue in cases to be removed from State Courts, and, under these two recent decisions, it is held that venue as to the original proceedings has nothing to do with venue or removal. Moreover THE SUPREME COURT OF THE STATE, in ruling that the two former cases are not controlling, HAS NOT HEEDED THE EXPRESS STATEMENT IN THE GENERAL INVESTMENT CASE (43 Sup. Ct. 106 at 112, 1st paragraph) THAT THE DECISION IN CAMP VS. GRESS WAS BASED ON THIS VERY DISTINCTION.

The cases of Tenn vs. Bank, 152 U. S. 454; 14 Sup. Ct. 654; Mexican National Bank vs. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, and Cochran vs. Montgomery Co., 199 U. S. 260, 26 Sup. Ct. 58, cited by the Supreme Court of the State, to the effect that a case to be removable must be one which could have originally been brought in a Federal Court are not in point, as these cases all relate to jurisdiction of the subject matter, and not to venue, and THE SUPREME COURT OF THE STATE, IN CITING THESE DECISIONS, HAS NOT HEEDED THE EXPRESS STATEMENT OF THIS COURT IN THE GENERAL INVESTMENT COMPANY CASE (43 Sup. Ct. 106 at 114, 1st paragraph) TO THE EFFECT THAT THESE CASES ARE NOT IN POINT.

As the defendant here was a Minnesota citizen, and the plaintiffs were citizens of States other than Minnesota (Wyoming and Montana), there was jurisdiction of the subject matter of this suit as a controversy between citizens of different States, and this suit could have originally been brought in any Federal Court, subject to a personal privilege in a defendant to object to the venue, but this would relate to venue and have nothing to do with removal, the venue of which, on removal, would be the Federal Court of the State where the suit was brought.

How, or why, the Lee and General Investment cases are not in point, or how, or why, the cases cited by the Court at plaintiff's instance, are in point does not appear.

B.

DUTY TO CARE FOR ANIMALS IN TRANSIT

The trial Court refused requested instructions No. 27 and 27 A imposing the general duty of caring for the animals in transit, on the caretaker as required by the contract and sustained the plaintiff's objection that "there was a default on the part of the shipper, and that the Act of Congress required the carrier to properly unload and feed the animals in the event that the shipper did not, and on the ground that the defendant was assisting in unloading." (M. 2581, l. 6, to p. 583, l. 4.) The Supreme Court concerning this said:

> "The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

The Court actually instructed the jury as follows:

Requested Instruction No. 8:

> "You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiffs compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana." (Tr. p. 559, l. 5; p. 563, l. 23; p. 584 to 586.)

The Supreme Court says that "the giving of this instruction was error," because not warranted by the evidence and, in any event, in other respects, it was error to give it.

Then the Court, in its decision declining to reverse the judgment, brushes these errors aside practically without comment and thereby deprives the defendant of the right which it had to have the jury correctly instructed, as regards the duty of caring for the animals in transit. It is idle for the Court correctly to interpret the Federal Law in favor of the defendant if, when the jury is erroneously instructed on that law and the defendant therefore prejudiced, no relief is to be given.

The Supreme Court says that, if the matter of unloading and feeding in transit is eliminated from the case, the other errors may be disregarded and the case of liability for the 142 head that died was fully tried under fairly proper instructions. In this respect the Court overlooks that the unloading, feeding and watering at Great Falls was strongly stressed in the evidence as a cause of the death of 142 head and by plaintiffs as a cause of some $30,000 depreciation in the balance of the herd.

BY WHAT RIGHT DOES THE COURT ELIMINATE THE MATTER OF THE UNLOADING AND FEEDING AT GREAT FALLS AND THE CLAIMED DEPRECIATION IN THE BALANCE? THE COURT DOES NOT AND COULD NOT SAY THAT THESE THINGS AND THE ADMITTED ERRORS IN THE INSTRUCTIONS ON THIS DID NOT AFFECT THE JURY.

To show how unwarranted was this action of the State Court it is necessary for us to briefly condense the testimony. *We cite plaintiff's testimony but here it should be borne in mind that defendant's testimony may also be considered because a conflict requires reversal if the jury was not properly instructed on that conflict.*

THE MAIN DAMAGE WAS DUE TO IMPROPER CARE IN TRANSIT

The shipment consisted of 984 head, of which 519 were three-year-old cattle, and the balance yearling steers (fol. 128; fol. 134; fol. 156; fol. 164). IT WAS

UNDISPUTED THAT WHEN THE ANIMALS WERE UNLOADED AT GREAT FALLS IN TRANSIT THERE WERE ONLY 9 DEAD AND 86 DOWN, AND THESE WERE LIMITED TO 3-YEAR-OLD CATTLE. Defendant's Exhibit 14 (fol. 359), a list made out as each car was unloaded, showed that, of eleven cars loaded with only yearling cattle, there were no cattle down and none dead. The remaining 21 cars were loaded with 3-year-old cattle, with the exception that seven of these cars each had one yearling with the older cattle (fol. 355 to fol. 360).

The President of the Cattle Company (p. 64, fol. 149 to 151) testified that later, after unloading, in addition to the 9 dead at the time of unloading, 132 more died. It was extraordinary, therefore, that the astonishingly heavy loss should occur in such a short transit, and there must have been some peculiar reason for all of the 142 dead cattle being 3-year-old cattle except two.

The plaintiffs claimed that the damage was due to the animals becoming overheated by a delay at the time the cattle were received by the Great Northern at the Junction at Mossmain, from eleven o'clock at night to five o'clock in the morning, awaiting connection and by one hour's delay in transit at Armington near Great Falls, awaiting opposing trains. Defendant claimed the loss was mainly due to a failure to give the animals proper care at Great Falls.

(2.)

Defendant Gave Many Reasons Why This Was True, Due to a Failure to Discharge the Duty of Caring for the Cattle at Great Falls.

The defendant showed that the animals had been practically off water, as far as any conscious effort to water them was concerned, for about 24 hours before loading at Cody was completed and, therefore, for more than 48 hours before unloading. This was undisputed (p. 26 to 28; p. 39; p. 40 to 41; p. 43 to 46; p. 125 to 127; p. 119 to 130; p. 39 to 48; p. 128 to 129), except plaintiffs denied that the animals would be thirsty. After watering at Cody only the day before loading the 3-year-olds were grazed on "salt sage" (p. 27; p. 121; p. 124; p. 126 to 127), it being admitted that this sage would increase the need for water (p. 121; p. 100 to 101; p. 196 to 197), though it was disputed whether it would be inherently injurious. Moreover the animals were not loaded in the cool of the early morning. The older cattle were separated from the younger cattle, preliminary to loading, in the heat of the day with the thermometer at 90 degrees, and they were also loaded first and remained packed in the cars for about 4 hours in the hot dusty atmosphere of the loading corrals (p. 28; p. 45 to p. 46; p. 48; p. 121 to p. 122; p. 127 to p. 128; p. 47). The three-year-old animals were also heavier loaded being loaded to a minimum of 26,000 pounds to the car, and the yearlings to a maximum of 16,000 lbs. (p. 46; p. 157; p. 91; p. 122; p. 119; p. 220 to p. 221; p. 222; p. 224 to p. 225; p. 226 to p. 229).

(3.)

ACTS OF THE CARETAKER AT GREAT FALLS AS A CAUSE OF THE DAMAGE.

The defendant contended that vastly the greatest part of the damage was due to the failure of the caretaker in handling the animals at Great Falls, overheated as they then were partly by reason of the foregoing conditions. The three-year-old animals required special care as to water. On arriving at Great Falls, the shipper unloaded the animals because of their condition, assisted by section laborers. But at that time, the gravest results had not been exhibited. There were but nine dead and the later deaths were largely due to him.

Thus the caretaker testified for the plaintiffs, that the railroad company sent a veterinary to assist him in handling the situation the next day after the unloading had been completed, in caring for the animals and while they were resting there (p. 37). This veterinary cautioned him, the caretaker distinctly recalled, to go easy in watering the animals and not to give them too much to drink, but the damage had already been done, for the caretaker testified that, upon arrival, when the animals would be unloaded, each car would be unloaded into a pen with water and the animals were very thirsty and would "make" for the water with a rush (p. 37; p. 113 to 114). The caretaker recognized that the trainmen and sectionmen were merely assisting him and were not expert cattle men, but were there only to carry out his instructions (Tr. p. 25; p. 37; p. 38; p. 83; p. 40), yet he gave them no instructions, where instructions were necessary, and exercised no care in cautioning them, except in minor particulars and his supervision was admittedly neglectful. In the matter of watering the animals, on which he was later cautioned by the veterinary, he exercised no prohibiting supervision, but acquiesced in, and took part in, what was done and, though he interfered with the men and exercised an active supervision in unloading, he allowed each car to be unloaded into the pens, in the ordinary way, with water and gave the animals all the water they could get (Tr. p. 38; p. 24; p. 25; p. 35; p. 38; p. 40; p. 113 to 114).

Indeed, at that time, far from keeping the animals off from large quantities of water, and instead of giving it to them slowly, he complained that the troughs were leaking so that the animals did not have an opportunity at once to take on a big fill from a full trough. The cattle were so thirsty that on hearing the water running in the troughs they would rush for it, piling over each other, to drink. (Tr. p. 24; p. 113 to p. 114).

The action of the caretaker was condemned by all. He was an inexperienced college student at the time, never having had any previous experience in handling cattle. He protested at the time of loading against being sent out with such a responsibility. (Tr. p. 28 to 29; p. 26; p. 22).

The witness Carney testified for the plaintiffs that he saw the cattle being unloaded into the pens with water, and the stronger were crowding the weaker ones and trampling them down. He saw a young fellow around there representing the shipper and Carney added, "It is true that I did feel that if he were supervising the attention that should be given to the cattle while unloading, or whoever was supervising, was not supervising correctly." The testimony of this witness was *practically limited to his account of what he considered a rather shameful neglect on the part of whoever was charged with the duty of supervising and is found on pages 113 to 114 of the transcript.*

The plaintiffs contended that, as bills were tendered by the defendant to the plaintiffs for feed furnished to the animals (Tr. p. 69 to p. 70), any duty in connection with watering and feeding the animals rested upon the defendant (Tr. p. 258). But these bills were merely for the price of the feed, not for labor.

The following references to the transcript, showing the presence of the caretaker and his neglect, set forth only the plaintiff's testimony and not the defendant's testimony in part in accord with, and part in opposition thereto (Tr. p. 24 to p. 25): "We finished unloading the 19th" (Tr. p. 25; p. 35 to p. 38). "A veterinarian that the railroad company had sent to me to assist me in handling the situation" (p. 37). "In the process of unloading I had only the assistance of the trainmen and section crew" (Tr. p. 38). "The crew that was working there and assisting was in charge of a foreman for the company. They were in charge of the section foreman" (p. 40; p. 113 to 117; p. 35).

Defendant's testimony was to the same effect (Tr. p. 344 to p. 365).

The defendant's requested instructions merely gave effect to the Federal Statute.

Comp. St. 1918, Sec. 8651.

That these requested instructions correctly stated the law is shown by the following decisions:

A. T. & S. F. Ry. Co. vs. Merchants Livestock Co., 273 Fed. 130;
Penn. R. Co. vs. Swift & Company, 258 Fed. 289;
Webster vs. U. Pac. Ry. Co., 200 Fed. 597 at 599;
Starr vs. C. B. & Q. R. Co., 173 N. W. 682;
Fluckinger vs. Chic. & N. W. Ry. Co., 154 N. W. 865;
So. Ry. Co. vs. Tollerson, 68 S. E. 798.

Indeed, the decision of the Supreme Court of Montana may be cited in support of this error, for the Court says:

> "The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

The Court's decision thus amounts merely to a statement that though the refusal to give these instructions was error and the error was doubled because of error in the instructions given on the subject, this was apparently harmless error, because, in the Court's opinion, the unloading and care of the animals at Great Falls did not contribute to the damage.

But the Court has no right arbitrarily so to rule, for, up to the time of the close of the plaintiff's case, there was no question, in the actual admissions of the plaintiffs' testimony, that the work of unloading, caring for and reloading the animals at Great Falls, was in charge of the shipper's caretaker, and no dispute existed that all of the duties of care in this particular rested upon the shipper to determine what should be done and to supervise the hands that were admitted to be merely assisting him. But, with this testimony manifesting such neglect in supervision, the plaintiffs appreciated the seriousness of the case if the jury were permitted to consider the palpable cause of the plaintiffs' damage as a neglect of a duty resting upon the shipper and hence it was that, in the settlement of instructions, the plaintiffs changed front and urged literally that the caretaker's failure was so great as to amount to a default by the shipper and hence, that the duty fell upon the carrier to make good this default, and these objections were sustained.

IT IS CLEAR THAT IT WAS DEFENDANT'S CONTENTION, SUSTAINED BY THE PROOF, THAT a great deal of fatal damage had not occurred when the animals were unloaded at Great Falls, and IT WAS THE CARE OF THE ANIMALS IN GREAT FALLS AND THE SUDDEN ADMISSION OF THE ANIMALS TO WATER THAT CAUSED THE DEATHS AND whatever additional damage was caused. Possibly there may have been a play for judgment either way in this particular, BUT THE CASE WAS SUBMITTED TO THE JURY ON THE BASIS THAT ANY MISTREATMENT AT GREAT FALLS, IN THE MATTER OF UNLOADING AND WATERING AND FEEDING THEM WAS A VIOLATION OF DUTY BY THE DEFENDANT, AND NOT A VIOLATION OF DUTY BY THE SHIPPER. THE JUDGMENT MAY FAIRLY BE CONSIDERED AS GROUNDED ON THE ERRORS IN THESE INSTRUCTIONS. These errors could not possibly be harmless.

We have shown the federal right especially claimed by the petitioner and that the Supreme Court of the State recognized the validity of the claim and then denied it, as a matter of procedure, under a declaration apparently that its denial did not affect the result, though how or why it did not affect the result is not stated.

Under the federal decisions, however, if it is clear that when a federal right is specifically set up and claimed, the Federal Court will not allow the State Court, under the guise of mere procedure, to deny the federal right.

> Atlantic Coast Line R. Co. vs. Burnette, 36 Sup. Ct. R. 75, 239 U. S. 199; 60 L. Ed. 226;
>
> Ward vs. Love County, 253 U. S. 17; 64 L. Ed. 75; 40 Sup. Ct. 419.

This case may be said to be somewhat unique in two respects; here (1) A STATE COURT HAS DENIED A FEDERAL RIGHT BY DECLINING TO HEED TWO CONTROLLING DECISIONS OF THE FEDERAL SUPREME COURT AND (2), IN THE SAME CASE, THE COURT ALSO REFUSES TO GIVE EFFECT TO ANOTHER RIGHT GIVEN BY A FEDERAL STATUTE, THE DENIAL OF WHICH, DECLARING IT TO HAVE BEEN ERROR, IT SEEKS TO EFFECT UNDER THE GUISE OF PROCEDURE.

III.

ERRORS ON BURDEN OF PROOF

In this case we need not really consider upon whom rests the burden of proving negligence. The issue is a simple one as to whether, where the shipper accompanies the stock and is in charge thereof, is the burden of proof on him or on the carrier either as to negligence or to trace *the cause of damage* to some act or omission of the carrier. The animals are admitted to have become sick in transit. They were over-heated and the question is whether the deaths were due to any over-heating due to defendant's negligence, or were the deaths due to sickness caused by over-heating, or to sickness caused by the act of the shipper in handling them at Great Falls and, especially in admitting the animals too quickly to too much water while overheated. Bear in mind that the animals were in the charge of the shipper all the time and, as far as the claim for depreciation in the living animals is concerned, the animals were, for five days taken away by the shipper from the railroad premises and exclusively in the custody of the shipper.

There is some little diversity of authority in the State decisions as to whether the burden of proof is on the carrier as to peculiar railroad matters, that is to say, to show that it was not negligent (10 Corpus Juris p. 379, Sec. 581). Where the issue is negligence and damage and its cause, following sickness, that is to say, damage and what acts or omissions (negligent or otherwise and by whomsoever done) caused the damage, the rule is stated in 10 Corpus Juris, p. 380, as follows:

> "*Sickness of livestock:* An important limitation on the foregoing principles, recognized by some decisions and perfectly sound in principle, is that where a recovery is sought for the sickness of live stock in transit, or from death resulting from sickness, the burden is on plaintiff to prove the carrier's negligence."

Indeed, though there is some slight conflict in the state decisions, the great weight of authority is to the effect that, where the shipper accompanies a shipment of livestock, the burden of proof is on the shipper all along the line, that is to say, the burden of proof is then on the shipper to show (a) the damage sustained by the stock in transit and (b) what acts or omissions of the defendant caused this damage and (c) that these acts or omissions of the defendant were negligent. Where, as is claimed here, there might be damage caused by acts of the shipper and by acts of the defendant, it might more correctly be said that the burden of proof was on the shipper to show (a) the entire damage sustained by the animals; (b) what acts or omissions caused the damage; (c) if some of these acts or omissions of the shipper, what part of the damage was caused by acts or omissions of the shipper and what part by acts or omissions of the carrier, and (d) that these acts or omissions of the carrier were negligent.

Thus from

10 Corpus Juris p. 381 and 382

we quote:

> "Where Owner Assumes Care of Stock During Transportation aa. Burden of Showing Negligence of Carrier. Although there is some authority to the contrary, the general rule is that, where by special agreement the owner of stock or his agent accompanies the shipment for the purpose of giving care and attention to stock, the burden is on the owner, in an action for damages for loss or injury alleged to be due to the negligence of the carrier, to prove that the loss or injury was the result of the carrier's negligence."

In the note to this text many cases are cited, from which we select the following:

Lane vs. Oregon Short Line R. Co., 198 Pac. 671 (Ida.);
Zimmerman vs. Northern Pacific Ry. Co., 167 N. W. 546 (Minn.);
Starr vs. C. B. & Q. R. Co., 103 Neb. 645; 173 N. W. 682 at 683;
Bartelt vs. Ore. R. & N. Co., 57 Wash. 16; 106 Pac. 487 at 488; 135 Am. S. R. 959;

St. Louis & S. F. R. Co. vs. Wells, 81 Ark. 469, 99 S. W. 534 at 536;
Terre Haute & L. R. Co. vs. Sherwood, 132 Ind. 129; 31 N. E. 781, 32 Am. S. R. 239, 17 L. R. A. 339;
Mosteller vs. Iowa Cent. Ry. Co., 153 Ia. 390, 133 N. W. 748 at 749.

The statements in the leading text books show the rule to be almost universal, and that the Montana decision in the Nelson case is almost without a companion.

5 Ruling Case Law, Carriers, Sec. 462;
4 Elliott on Railroads, 3rd Ed., Sec. 2334 and 2338;
Mitchie on Carriers, Section 2085;
3 Hutchinson on Carriers, Sec. 1608.

The case of Nelson v. G. N. Ry. Co., 28 Mont. 297, 72 Pac. 642, is contrary to the general rule and does not control in interstate shipments.

However, this matter is not subject to even slightly varying state decisions, as the shipment was an interstate shipment, for the following cases hold that the question of the burden of proof in interstate matters is a matter of substance and not of procedure and is not a subject of state decision but of general law to be decided by the Federal Courts and that the Federal rule is, in accordance with a whole host of authorities, to the effect that the burden of proof is on the shipper throughout where the caretaker accompanies the shipment:

Berry v. C. & A. Ry. Co., 203 S. W. 622 at 623;
Baker v. Schaff, 211 S. W. 103 to 104;
Bland v. C. & A. Ry. Co., 232 S. W. 268;
Neely v. Hines, 227 S. W. 650;
So. Pac. Ry. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836; 36 Sup. Ct. 469.

Likewise as regards damages due to negligence of shipper, the burden of proof is on the shipper, to ow that the damage was caused by the carrier. Here greater part of the herd was in the exclusive possion of the shipper and was not again delivered to railroad at Great Falls until after five days. The esent case is an extreme case, for the same reason ich required the shipper to prove the condition of imals at the time he delivered them to a railroad, reired the shipper to prove the condition of the balance the herd when he, in effect, redelivered them to the ilroad at Great Falls. But in any case, where the ipper accompanies the stock under a contract to look ter them, part of the burden of proving that damage as caused by acts of the carrier requires that the burn of proof shall be on the shipper to show the damge was so caused and not caused by the shipper's own ts. Hence, it was error to give Plaintiff's Requested struction No. 5 (Tr. fol. 558).

From

10 Corpus Juris, p. 382,

e quote:

> "*Burden of Showing Absence of Negligence of Caretaker.* Where by agreement the shipper accompanies the stock for the purpose of taking care of it during transportation, the burden is on him in an action for loss or injury to show that such loss or injury was not due to any negligence on his part in the performance of the duties assumed by him, since he assumes duties as fully and explicitly as does the carrier."

We respectfully submit, therefore, that, as the evience showed that the animals died or were damaged rom an inherent want of vitality however caused, the instructions proposed by the plaintiffs (No. 3, 4, and 5; p. 244 to 246), were inapplicable to the case and were erroneous as placing the burden on the defendant, as was also the plaintiffs' proposed Instruction No. 3 (Tr. p. 244), given by the Court as the Court's Instruction No. 3 placing the burden further on the defendant to show whether the sickness was caused by acts of plaintiffs' caretaker during the transit.

MISCELLANEOUS.

Respondents have lately urged that petitioner should be denied relief because of delays. The delays are not petitioner's. Petitioner seasonably asserted its rights by filing a petition for removal. Respondents ought not to have resisted that petition, for, as regards a case founded on the Interstate Commerce Act, it has always been the law that this case was always removable, because if not removable except in Minnesota, defendant's home, it could not be removable at all because it did not arise under general laws of the United States, but jurisdiction existed under the 8th subdivision of Sec. 24 of the Judicial Code and, therefore, it could be removed only by a non-resident as "any other suit of a civil nature." (See 28 Judicial Code). The Lee case and the General Investment case certainly did not in any way change the law in this kind of case, founded on the 8th subdivision aforesaid.

As regards petitioner's duty to proceed in the Federal Court notwithstanding removal was refused, it was rather respondents' duty to allow removal and to move to remand if so advised. In the absence of an outstanding attachment or injunction petitioner would not be impelled to proceed in the face of the State tribunal's decision and thus bring the State and Federal trial tribunals in conflict. Comity, proper practice, courtesy, and a whole host of decisions suggested just the course petitioner took; to bow to the State Court's ruling and seek relief through the State Appellate Court, in the meantime applying for and obtaining from the Federal trial Court an extension of the time to file the transcript on removal until thirty days after the State Court should sign the order of removal. As the State Court was ousted of jurisdiction, its proceedings were void and defendant need have done nothing more. But it is submitted that its action, thus approved by the order of the Federal trial tribunal, was in addition entirely proper. Any other course, though within its rights, would unnecessarily have brought State and Federal tribunals in conflict. Plaintiff had the key to the situation by seeking relief in the Federal tribunal. The delays have been plaintiffs' delays, a strange ground for urging a denial to defendant.

Besides the delays have been caused by respondents literally successfully urging upon the State Appellate Court to follow trial federal court decisions opposed to decisions of the Federal Supreme Court and to escape Supreme Court decisions by attempting distinctions without the slightest foundation—a course not to be encouraged. An examination of the briefs on the merits filed in this Court in said Cause No. 312, Oct. Term, 1923, will show how clearly this appears.

Delays in that this is the second application for certiorari are excused in that petitioner is thus not accused of proceeding tardily, but too soon, and it was the extraordinary refusal of the Supreme Court of the State to follow the decisions of the Supreme Court of the United States that led to belief that it was proper to submit the petition (which was granted over respondents' objection) at that time; and here again respondents could have avoided the delay by not declaring that they might not consent to a reduction of the judgment and then, defeating certiorari, electing as they said they might not do; they could have elected at once, as they always intended, and this case would then long ago have been decided. It is respondents who have caused delays.

Moreover, delays can be avoided by respondents joining with petitioner as it now offers, in submitting this cause on the former record and briefs filed in said cause in its former appearance in this Court as Cause No. 312, October Term, 1923. In any event it would be new law that delays (even if not caused by respondents) can be a ground for defeating a question as fundamental as jurisdiction.

Besides this is urged by respondents only on the removal feature and does not affect the denial of other federal rights.

Lastly a failure to correct the decision in this case would confuse all of the Montana District Courts, on whom the Montana Supreme Court's decision would be binding.

Respectfully submitted,

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WM. R. STANSB
CL

No. 30506

No. 138

IN THE

Supreme Court of the United States

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Petitioner,

vs.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, and EUGENE PHELPS, as Executor of the Last Will and Testament of L. G. PHELPS, deceased,
Respondents.

BRIEF OF PETITIONER

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Filed.., 1925.

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IN THE

Supreme Court of the United States

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Petitioner,
vs.
GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, and EUGENE PHELPS, as Executor of the Last Will and Testament of L. G. PHELPS, deceased,
Respondents.

BRIEF OF PETITIONER

INTRODUCTORY STATEMENT.

This case formerly appeared in this Court as Cause No. 29581 (R. 261 to 295, 306) on a Writ of Certiorari to review a judgment of the Supreme Court of the State of Montana (R. 265 to 276, 306), affirming the jurisdiction of the Trial Court but granting a new trial unless the plaintiff would consent to a reduction of $1020.00 in a judgment of the Trial Court (R. 18 to 19) which was entered upon a verdict of a jury (R. 18) awarding the plaintiffs compensation in the sum of $20,685.90 for damages claimed to have been sustained to 984 head of cattle in transit from Cody, Wyoming, on the Railway of the Chicago, Burlington & Quincy Railroad

Company to Seville, Montana, on the railway of the Great Northern Railway Company, the terminal carrier, which was the sole defendant in the Trial Court.

The case as formerly presented, after certiorari was granted (262 U. S. 740; 43 S. C. 702; 67 L. ed. 1209) was dismissed (264 U. S. 571; 44 S. C. 334; 68 L. ed. 855) on the ground that the judgment of the Supreme Court of the state was not a final judgment, and that, therefore, the proceedings in certiorari were premature, and certiorari would not lie until the case had been remanded to the Trial Court and a new trial had, or a new judgment entered and a second appeal taken to the Supreme Court of the state, whose judgment would then, for the first time, become a final judgment.

Accordingly, further proceedings were had in the Trial Court, and, upon the mandate from the Supreme Court of the state reaching the Trial Court, the plaintiffs elected to abide by the modification of the judgment (R. 297), and a new judgment was accordingly entered in favor of the plaintiffs and against the defendant in the reduced sum (R. 296 to 297). The defendant then at once appealed (R. 298) from this judgment, and the hearing was expedited and the cause advanced (R. 299 to 306). But the Supreme Court of the state thereupon dismissed this appeal (R. 307 to 308) on the ground that its former decision was controlling, thereby under the statutes of Montana (R. C. 1921, Sec. 9748) affirming the judgment.

Accordingly the cause then being in condition to be reviewed, and all further suggested steps in the state court having been taken as directed, nevertheless, to avoid any further question of practice as to the Court to which the writ should run, the railway company, defendant below, petitioner here, petitioned for a writ of certiorari to run to the Trial Court if its judgment was the final judgment of the highest court of the state where a decision could be had, and to run to the Supreme Court of the state to review its judgment dismissing the appeal, if, under the statutes of Montana, that was the final judgment of the highest court of the state. The writ was thereupon granted (R. 312; .... U. S. ....; 45 S. C. 94; 69 L. ed. 34).

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

Only the decisions of the Supreme Court of Montana are officially reported. The following constitutes, therefore, a full reference to the opinions of the Supreme Court of Montana and of the Supreme Court of the United States giving the history of this case to date, to-wit:

1. Decision of the Supreme Court of Montana on first appeal: Phelps et al. vs. Great Northern Railway Company, 66 Mont. 198, 213 Pac. 610.
2. Decision of Supreme Court of the United States granting a Writ of Certiorari to review the first judgment of the State Supreme Court: Great Northern Railway Company vs. Galbreath Cattle Company et al., 262 U. S. 740; 43 S. C. 702; 67 L. ed. 1209.
3. Decision of Supreme Court of the United States dismissing this Writ of Certiorari as premature: Great Northern Railway Company vs. Galbreath Cattle Company et al., 264 U. S. 571; 44 S. C. 334; 68 L. ed. 855.
4. Decision of the Supreme Court of the State on the

second appeal: Phelps et al. vs. Great Northern Railway Company, 71 Mont. ....; 227 P. 65.

5. Decision of the Supreme Court of the United States granting this second Writ of Certiorari: Great Northern Railway Company vs. Galbreath Cattle Company et al., ... U. S. ....; 45 S. C. 94; 69 L. ed. 34.

DATE OF JUDGMENT TO BE REVIEWED WITH REFERENCE TO RECORD.

The judgment of the Supreme Court of Montana is dated June 21, 1924, dismissing the appeal. See the opinion of the Court (R. 307) and the minute entry thereof (R. 307).

The judgment of the Trial Court is dated May 15, 1924 (R. 296 to 298). The writ of certiorari was thus timely applied for, whichever judgment is to be reviewed.

CLAIMS ADVANCED AND RULINGS MADE AND RELIED UPON AS THE BASIS OF THIS COURT'S JURISDICTION.

Three matters are submitted in this proceeding: The first **(1)** question to be presented will be the error in the State Court's upholding (R. 8 to 9; 266 to 269, 296 to 297, 307 to 308) its jurisdiction notwithstanding the same had been brought to an end by a petition filed by the defendant for a removal of the case to the United States Court (R. 5 to 8) on the ground of diversity of citizenship, and on the ground that the case arose under the Act to regulate interstate commerce. This is the subject of Specification of Errors I.

The next two questions relate to the denial of other

Federal rights in the form of fundamental errors in instructions given and refused, such as **(2)** the failure properly to instruct the jury as to the person upon whom rested the burden of caring for the animals in transit (Specifications II-a to e), this involving the instructions erroneously given (R. 245 to 247, 258) and, indeed, conceded by the Court to have been erroneously given (R. 270 to 273), and instructions refused (R. 256 to 257), which again the Court conceded should have been given (R. 273); and **(3)** the failure properly to instruct the jury (Specifications III-a and b) as to the Federal rule as to the burden of proof where the shipper's caretaker accompanies the stock and is in charge thereof (R. 243 to 245); but the Supreme Court of the State held (R. 275) that a Montana rule would control.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The above statement itself shows that this Court's jurisdiction is clear; nevertheless reference is here made to Section 237 of the Judicial Code, subdivision b, defining jurisdiction to review judgments of state courts, and showing certiorari to be the proper remedy.

A reference to other sections relates to jurisdiction of the subject matter. Thus Sec. 28 relates to jurisdiction on removal and incorporates, by reference, Sec. 24, including subdivision "eighth" thereof, as to original jurisdiction of district courts. Sec. 51 defines merely venue. All of these sections relate to the removal feature.

As regards jurisdiction over the other questions, the carrier's duties as to interstate shipments are found in the acts regulating commerce, and especially in Comp. Stats. 1918, Sec. 8651 and Comp. Stats. Sec 8604-a.

CASES SUSTAINING SUCH JURISDICTION.

Complying with the rules, it may be said that a whole host of cases, almost from the beginning, of course sustain the right to review a judgment of a state court where the question of the right of removal is raised.

See B. & O. R. Co. vs. Koontz,
104 U. S. 5; 26 L. ed. 643,

and other cases cited in the brief of the argument.

The error in the instructions in effect relieving the shipper from the duty to care for the animals in transit involves the statute of the United States above cited, commonly called the 28-hour law. Its meaning is clear, but apparently it was drawn in question. In any event defendant's claim of a right thereunder to be exonerated under certain circumstances from the duty of caring for the animals was a Federal right specially set up and claimed, and, as regards the error in the burden of proof, the following authorities show that this is not a matter of local pleading or practice, but this being an interstate shipment is governed by Federal law, and other authorities appear in the brief of the argument:

Adams Express Co. vs. Croninger,
226 U. S. 491, 57 L. ed. 314, 33 S. C. 148;
Central Vermont R. Co. vs. White,
238 U. S. 507, 59 L. ed. 1433, 35 S. C. 865.

A.

STATEMENT OF THE CASE

I.

DENIAL OF RIGHT OF REMOVAL TO UNITED STATES COURT.

As to the first of these questions, your petitioner, as stated, duly filed in the Trial Court a petition for the removal of the case to the United States District Court for Montana (Tr. p. 6 to 8), on the double ground that the complaint (T. p. 1 to 5) showed that the case arose under the laws of the United States and, indeed, being a case to recover alleged damage to cattle in an interstate shipment, it arose under the Federal laws regulating commerce (R. p. 6 l. 12 to 24; p. 7 l. 14 to 31) and, secondly, on the ground that it arose between citizens of different states, in that the defendant was a Minnesota citizen and one of the plaintiffs was a Wyoming citizen and the other plaintiff was a Montana citizen (R. p. 6 l. 12 to 37). THE TRIAL COURT expressly found that the right of removal was properly preserved, but RULED THAT THE CASE DID NOT ARISE UNDER THE COMMERCE LAWS AND THAT THERE WAS NOT SUFFICIENT DIVERSITY OF CITIZENSHIP, AS A MATTER OF VENUE, FOR THE SUIT TO BE ORIGINALLY BROUGHT IN THE FEDERAL COURT AND, THEREFORE, THE TRIAL COURT DENIED REMOVAL (R. 8.). THE SUPREME COURT overruled defendant's exception and sustained the denial of the right of removal, and

DECLINED TO FOLLOW THE CONTROLLING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES in General Investment Company vs. Lake Shore and Mich. S. Ry. Co., *infra*, and in Lee vs. Ches. & O. Ry. Co., *infra*, AND HELD THAT THESE DECISIONS were not controlling or applicable and DID NOT AFFECT other decisions such as SMITH vs. LYONS, *infra*, and CAMP vs. GRESS, *infra*, AND THAT, therefore, THE VENUE PROVISIONS, of the Federal laws, DEFINING ORIGINAL JURISDICTION so-called, STILL CONTROL JURISDICTION ON REMOVAL, contrary to the clear and express declarations of the said recent controlling decisions of this Court. Said Supreme Court also ruled that this cause did not arise under the commerce laws of the United States (R. p. 267, bottom, to p. 269, top), thereby declining to follow other decisions of this Court hereafter cited. A WRIT OF CERTIORARI WAS, THEREFORE, NECESSARY TO SECURE FOR DEFENDANT THIS FEDERAL RIGHT OF REMOVAL WHICH HAS BEEN DENIED TO IT IN THE VERY FACE OF THESE CONTROLLING DECISIONS.

II.

DENIAL OF OTHER FEDERAL RIGHTS.

It is somewhat unsatisfactory to present as a ground of reversal a single procedural question. But here the procedural question goes to jurisdiction and in addition there are presented two additional grounds of reversal showing how, in other respects, the defendant below has been unjustly deprived of further federal rights.

Thus, in the first place, there was

1.

A Denial of a Duty on the Shipper to Unload, Feed, Water and Rest Cattle in an Interstate Shipment and Placing this Duty on the Carrier, Contrary to the Federal Statute.

The Trial Court, in the settlement of the instructions to the jury, refused Defendant's requested Instructions Nos. 27 and 27A (R. 256 and 257), giving effect to the statutes of the United States (Sec. 8651, Com. Stat. 1918), and the provisions of the interstate bill of lading (R. 262 to 264), admitted to have governed this interstate shipment, whereby the duties connected with the unloading and caring for the animals in transit were assumed by the shipper. The requested instructions, imposing this general duty of caring for the animals in transit on the caretaker as specifically required by the shipping contract, are set out verbatim in Specifications IIA and IIC in this brief. But the Court refused these requested instructions and sustained plaintiff's objection thereto that "there was a default on the part of the shipper and that the Act of Congress (?) required the carrier to properly unload and feed the animals in the event that the shipper did not, and on the ground (?) that the defendant was assisting in unloading." R. 256 to 257; Specifications IIB and IID in this brief.)

The Supreme Court, concerning the refusal to give these instructions, said (R. p. 273 l. 27 to 32):

> "The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

THE SUPREME COURT OF MONTANA, in its judgment, thus HOLDS THAT IT WAS ERROR TO REFUSE THESE REQUESTED INSTRUCTIONS (R. l. 14 to 32) concerning a vital matter in the cause reasonably exerting a controlling influence on the jury, (See testimony: Original Exhibit 1; R. 21 to 25; 26 to 30; 34 to 38; 40 to 48; 51 to 52; 59 to 63; 75 to 78; 79 to 85; 89 to 91; 98 to 102; 103 to 112; 113 to 114; 118 to 124; 125 to 130; 130 to 136; 139 to 143; 143 to 146; 146 to 149; 154 to 159; 169 to 172; 218 to 238,) AND THEREBY RULED IN FAVOR OF THE FEDERAL RIGHT CLAIMED BY YOUR PETITIONER AS DEFENDANT BUT THE SUPREME COURT, after ruling that the trial Court denied defendant a Federal right and after upholding the Federal right, DECLINED TO GIVE EFFECT TO THIS FEDERAL RIGHT FOR, instead of reversing the judgment so grounded upon this denial of a Federal right, THE COURT UPHOLDS THE JUDGMENT SO ERRONEOUSLY GROUNDED NOTWITHSTANDING THIS ERROR. The Supreme Court in effect, thus denies the Federal right.

The Trial Court, refusing defendant's said requested instructions correctly stated the law, in fact, in Instruction No. 8 (R. 247, 258) instructed the jury as follows:

> "You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiff's compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana."

The Supreme Court says that, "the giving of this instruction was error," because not warranted by the evidence and, in any event, in other respects, it was error to give it. (R. 270 to 273.)

Then the Court, in its decision declining to reverse the judgment, brushes this error aside practically without comment and thereby deprives the defendant of the right which it had to have the jury correctly instructed, as regards the duty of caring for the animals in transit. It is idle for the Court correctly to interpret the Federal Law in favor of the defendant if, when the jury is erroneously instructed on that law and the defendant therefore prejudiced, no relief is to be given.

The Supreme Court says (R. 275 to 276) that, if the matter of unloading and feeding in transit is eliminated from the case, the other errors may be disregarded and the case of liability for the 142 head that died in the brief transit was fully tried under fairly proper instructions. In this respect the Court overlooks that the unloading, feeding and watering at Great Falls was strongly stressed in the evidence as a cause of the death of 142 head and by plaintiffs as a cause of some $30,000 additional claimed depreciation in the balance of the herd.

BY WHAT RIGHT DOES THE COURT ELIMINATE THE MATTER OF THE UNLOADING AND FEEDING AT GREAT FALLS AND THE CLAIMED DEPRECIATION IN THE BALANCE? THE COURT DOES NOT AND COULD NOT SAY THAT THESE THINGS AND THE ADMITTED ERRORS IN THE INSTRUCTIONS ON THIS DID NOT AFFECT THE JURY, and the verdict of the jury is several thousand dollars in excess of the maximum amount claimed by plaintiff by reason of the death of the 142 head, as to which number alone the Court says the case was properly tried.

To show how unwarranted was this action of the State Court it is necessary for us to briefly condense the testimony.

REVIEW OF TESTIMONY

We cite in the main plaintiff's testimony, but here it should be borne in mind that defendant's testimony may also be considered because a conflict requires reversal if the jury was not properly instructed on that conflict.

(1.)

THE MAIN DAMAGE WAS DUE TO IMPROPER CARE IN TRANSIT.

The shipment consisted of 984 head, of which 519 were three year old cattle, and the balance yearling steers (R. 55, 67). IT WAS UNDISPUTED THAT WHEN THE ANIMALS WERE UNLOADED AT GREAT FALLS IN TRANSIT THERE WERE ONLY 9 DEAD AND 86 DOWN, AND THESE WERE LIMITED TO 3 YEAR OLD CATTLE. Defendant's Exhibit 14 (R. 155 to 157) a list made out as each car was unloaded, showed that, of eleven cars loaded with only yearling cattle, there were no cattle down and none dead. The remaining 21 cars were loaded with 3 year old cattle, with the exception that seven of these cars each had one yearling with the older cattle (R. 156 to 157).

The President of the Cattle Company (R. 64) testified that later, after unloading, in addition to the 9 dead at the time of unloading, 133 more died, making the total dead 142. It was extraordinary, therefore, that the astonishingly heavy loss should occur in such a short transit, and there must have been some peculiar reason for all of the 142 dead cattle being 3 year old cattle except two.

The plaintiffs claimed that the damage was due to the animals becoming overheated by a delay at the time the cattle were received by the Great Northern at the Junction at Mossmain, from eleven o'clock at night to five o'clock in the morning, awaiting connection, and by one hour's delay in transit at Armington near Great Falls, awaiting opposing trains. Defendant claimed the loss was mainly due to a failure to give the animals proper care at Great Falls.

(2.)

DEFENDANT GAVE MANY REASONS WHY THIS WAS TRUE, DUE TO A FAILURE TO DISCHARGE THE DUTY OF CARING FOR THE CATTLE AT GREAT FALLS.

The defendant showed that the animals had been practically off water, as far as any conscious effort to water them was concerned, for about 24 hours before loading at Cody was completed and, therefore, for more than 48 hours before unloading. This was undisputed (R. 27 to

28; 40 to 41; 43 to 46; 125 to 127; 119 to 130; 39 to 48; 128 to 129), except plaintiffs denied that the animals would be thirsty. After watering at Cody only the day before loading, the 3 year olds were grazed on "salt sage" (R. 27; 121 to 124; 126 to 127), it being admitted that this sage would increase the need for water (R. 121; 100 to 101; 195), though it was disputed whether it would be inherently injurious. Moreover the animals were not loaded in the cool of the early morning. The older cattle were separated from the younger cattle, preliminary to loading, in the heat of the day with the thermometer at 90 degrees, and they were also loaded first and remained packed in the cars for about 4 hours in the hot dusty atmosphere of the loading corrals (R. 27 to 28; 47 to 48; 121 to 122; 128; 47). The three year old animals were also heavier loaded, being loaded to a minimum of 26,000 pounds to the car, and the yearlings to a maximum of 16,000 lbs. (R. 46; 157; 90 to 91; 122; 119; 220 to 222; 224 to 225; 226 to 229.)

(3.)

ACTS OF THE CARETAKER AT GREAT FALLS AS A CAUSE OF THE DAMAGE.

The defendant contended that vastly the greater part of the damage was due to the failure of the caretaker in handling the animals at Great Falls, overheated as they then were partly by reason of the foregoing conditions. The three year old animals required special care as to water. On arriving at Great Falls, the Shipper unloaded the animals because of their condition, assisted by section laborers. But at that time, the gravest results had not been exhibited. There were but nine dead and the later deaths were largely due to him.

Thus the caretaker testified for the plaintiffs, that the railroad company sent a veterinary to assist him in handling the situation the next day after the unloading had been completed, in caring for the animals and while they were resting there (R. 37). This veterinary cautioned him, the caretaker distinctly recalled, to go easy in watering the animals and not to give them too much to drink, but the damage had already been done, for the caretaker testified that, upon arrival, when the animals would be unloaded, each car would be unloaded into a pen with water and the animals were very thirsty and would "make" for the water with a rush (R. 37; 113 to 114). The caretaker recognized that the trainmen and sectionmen were merely assisting him and were not expert cattle men, but were there only to carry out his instructions (R. 25; 37 to 38; 40), yet he gave them no instructions, where instructions were necessary, and exercised no care in cautioning them, except in minor particulars and his supervision was admittedly neglectful. In the matter of watering the animals, on which he was later cautioned by the veterinary, he exercised no prohibiting supervision, but acquiesced in, and took part in, what was done and, though he interfered with the men and exercised an active supervision in unloading, he allowed each car to be unloaded into the pens, in the ordinary way, with water and gave the animals all the water they could get (R. 38; 24 to 25; 35 to 40; 113 to 114).

Indeed, at that time, far from keeping the animals off from large quantities of water, and instead of giving it to them slowly, he complained that the troughs were leaking so that the animals did not have an opportunity at once to take on a big fill from a full trough. The cattle were so thirsty that on hearing the water running in the troughs they would rush for it piling over each other to drink (R. 24; 39 to 40; 113 to 114).

The action of the caretaker was condemned by all. He was an inexperienced college student at the time, never having had any previous experience in handling cattle. He protested at the time of loading against being sent out with such a responsibility (R. 22, bottom; 26, 28, bottom, to 29, top).

The witness Carney testified for the plaintiffs that he saw the cattle being unloaded into the pens with water, *and the stronger were crowding the weaker ones and trampling them down. He saw a young fellow around there representing the shipper and Carney added "It is true that I did feel that if he were supervising the attention that should be given to the cattle while unloading, or whoever was supervising, was not supervising correctly." The testimony of this witness was practically limited to his account of what he considered a rather shameful neglect on the part of whoever was charged with the duty of supervising and is found on pages 113 to 114 of the transcript.*

The plaintiffs contended that, as bills were tendered by the defendant to the plaintiffs for feed furnished to the animals (R. 69 to 70), any duty in connection with watering and feeding the animals rested upon the defendant (R. 247). But these bills were merely for the price of the feed, not for labor.

The following references to the transcript, showing the presence of the caretaker and his neglect, set forth only the plaintiff's testimony and not the defendant's testimony in part in accord with, and part in opposition thereto: (R. 25) "We finished unloading the 19th." (R. 25; R. 35 to p. 38) "A veterinarian that the railroad company had sent to me to assist me in handling the situation." (R. 37) "In the process of unloading I had only the assistance of the trainmen and section crew." (R. 38) "The crew that was working there and assisting was in charge of a foreman for the company. They were in charge of the section foreman." (R. 40; 112 to 114; 35.)

Defendant's testimony was to the same effect. (R. 149 to 159.)

(2.)

IMPOSING BURDEN OF PROOF ON CARRIER WHERE SHIPPER ACCOMPANIES STOCK.

The Trial Court placed the burden of proof in this action upon the carrier (R. 245, Specification of Errors

III A and B in this brief) notwithstanding this was an interstate shipment and the shipper's caretaker accompanied the shipment, whereas, under the Federal law, the burden, under such circumstances, would be on the shipper. The Supreme Court upheld this action of the Trial Court on the ground that the interstate character of this shipment was defeated by this being an action against the terminal carrier, and hence it was held that the exceptional Montana rule (Nelson v. G. N. Ry. Co., 28 Mont. 297; 72 Pac. 642) on the burden of proof applied (R. 268, 275). Thereby the Supreme Court denied defendant, as a terminal carrier in an interstate shipment moving under a bill of lading issued by the initial carrier, a Federal right.

B.

SPECIFICATION OF ERRORS

I.

It was error in the Court to deny Defendant's Petition for the Removal of the Cause to the Federal Court (Tr. p. 5 to 9).

II-A.

It was error in the Court to refuse Defendant's Requested Instruction No. 27 as follows: (R. 256.)

> You are instructed that under the law the obligation to unload and reload the cattle in transportation rested upon the shippers and not upon the railway company and that therefore the railroad company is not under any obligation to furnish for the purpose of unloading or reloading the cattle in question expert help in that regard

and that plaintiffs cannot complain in this action because the men who assisted in the unloading and reloading were not expert cattle men.

II-B.

It was error in the Court to sustain the following objection to Defendant's Offered Instruction No. 27, to-wit (R. 256):

That is objected to because under the law the railroad company is obliged to unload and care for the cattle in default of the shipper doing that, and this instruction would be inconsistent with the instruction given by the Court at the request of the plaintiffs. This being an interstate shipment they are bound by the Act of Congress which requires the company to unload and feed the cattle in the event that the shipper does not, and in this case the defendant did furnish feed and charged the same to the plaintiff.

II-C.

It was error in the Court to refuse Defendant's Requested Instruction No. 27-a as follows (R. 257):

You are instructed that aside from doing the actual details of the unloading, loading or care of the cattle in transit, the duty of supervising said unloading, loading and care rested primarily upon the plaintiffs and their agents and they cannot recover for damages, if any, caused by negligence, if any, on their part in not properly supervising said unloading, loading or care (aside from doing the actual details of the same) or to which their said negligence, if any, contributed as a cause.

II-D.

It was error in the Court to sustain the following objections to the Defendant's Requested Instruction No. 27-a to-wit (R. 257):

That is objected to because inconsistent with instructions given at the request of plaintiff and for the reason that there is no evidence to predicate the instruction upon, and for the further reason that as appears from the evidence the defendant, without any particular request upon the part of the plaintiff's agent, caretaker, began to assist in the unloading. There is no evidence tending to show any supervision on the part of the caretaker, and for the further reason that the defendant company was obliged to unload the cattle, and for the further reason that there is no evidence whatever to show that there was any damage of any character whatsoever from the caretaker participating in the unloading.

II-E.

It was error in the Court to give Plaintiff's Requested Instruction No. 8, the same appearing as Court's Instruction No. 8 (R. 245 to 247; 258) as follows:

You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiffs compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana.

II-F.

It was error in the Court to overrule the following objections to Plaintiffs' Requested Instruction No. 8, same appearing as Court's Instruction No. 8 (R. 245 to 247):

The defendant objects to that on the ground that it is an erroneous statement of the evidence, and the proof does not show that the defendant undertook to unload or did unload the cattle, but that the defendant's employees merely assisted the caretaker in his duty to attend to the matter of unloading, watering, feeding and caring for the animals, and that bills were not tendered to the plaintiffs or paid by the plaintiffs for any work done by defendant's employees in the premises in assisting the caretaker. The bills were merely bills for feed which the defendant procured for the shipper. Under the law it is not the duty of the defendant to unload the cattle or to properly feed or water the same, or take care of them while they are in the feed yards at Great Falls, but on the contrary this is a duty resting upon the shipper and his caretaker.

Further under this instruction, though an incompetent caretaker was sent in charge of the shipment and the employees of the defendant assisted him in discharging his duty to unload the animals, and the animals were damaged by reason of his failure to instruct them as to how they should unload the animals, or how they should be rested, or how they shoud be cared for, or the animals were injured by reason of his failure to give directions as regards feed, the defendant would be held liable though it was not in fact negligent. Under the law railroad employees are not expert cattle men and the caretaker is supposed to be, and the duty of determining what should be done and of seeing to it that the animals are properly unloaded and cared for rests upon the shipper and not upon the railway company. The caretaker is here on the ground, and this instruction as framed would make the railway company liable even if he was on the ground and directing what should be done, or they were assuming that in the absence of direction by him that they were doing the right thing.

III-A.

It was error in the Court to give its Instruction No. 3, being Plaintiff's Offered Instruction No. 3, as follows (R. 243):

You are instructed that the burden of proof is on the defendant to show negligence, if any, on the part of the plaintiff's caretaker who was in charge of said cattle, in respect to the manner of looking after the same while being transported by the defendant.

III-B.

It was error in the Court to give its Instruction No. 5, the same being Plaintiff's Requested Instruction No. 5, as follows (R. 243 to 245):

You are instructed that if you find the cattle in question were delivered to the defendant in good condition for transportation and are injured during transportation and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries other than the alleged beating of said cattle were occasioned by some other cause than its own negligence, though the shipper accompanies the shipment.

C.

BRIEF OF THE ARGUMENT

The brief of the argument will follow the outline of the statement of the case and will cover (1) the denial of the right of removal, (2) the error in the instructions defining the duty to care for the animals in transit, and (3) the error in the instructions on the burden of proof.

I.

DENIAL OF REMOVAL TO FEDERAL COURT.

As the right of removal was seasonably urged, all further proceedings were without jurisdiction and void:

B. & O. R. Co. vs. Koontz,
  104 U. S. 5; 26 L. Ed. 643;
Gordon vs. Longest,
  10 L. Ed. 900; 41 U. S. 97;
Goldey vs. Morning News,
  156 U. S. 518; 16 Sup. Ct. 509; 39 L. Ed. 517;
Kanouse vs. Martin,
  14 L. Ed. 660; 56 U. S. 198;
National Steamship Co. vs. Tugman,
  106 U. S. 118; 1 Sup. Ca. 58; 27 L. Ed. 87;
Powers vs. Chesapeake & O. R. Co.,
  169 U. S. 92; 42 L. Ed. 673; 18 Sup. Ct. 264;
Kern vs. Hindekoper,
  103 U. S. 485; 26 L. Ed. 354;
Home Life Insurance Co. vs. Dunn,
  22 L. Ed. 68; 86 U. S. 214;
Marshall vs. Holmes,
  141 U. S. 589; 12 Sup. Ct. 62; 35 L. Ed. 870.

Though the entire record is voluminous, the pertinent portions on the removal feature are involved in a few pages. This would include the complaint (R. 1 to 5) and the removal proceedings (R. 5 to 9).

1.

A SUMMARY DISCUSSION OF THIS MATTER.

As the action arose against a terminal carrier in interstate commerce, the suit arose under the Act to regulate commerce.

Adams Express Co. vs. Croninger,
  226 U. S. 491;
    57 L. Ed. 314; 33 Sup. Ct. 148;
Kansas City So. Ry. Co. vs. Carl,
    33 Sup. Ct. 391; 227 U. S. 639;
    57 L. Ed. 683;

M. K. & T. Ry. Co. vs. Ward,
61 L. Ed. 1213;
37 Sup. Ct. 617; 244 U. S. 383.

Moreover, as the defendant was a citizen of Minnesota and the plaintiffs citizens of states other than Minnesota (Montana and Wyoming), the Federal Courts would have jurisdiction over the subject matter of this suit as one arising under this Federal law and on the ground of diversity of citizenship, and the case could be removed to the District Court for Montana irrespective of any venue provision of the Federal statutes concerning venue of suits originally to be brought in a Federal Court.

General Investment Co. vs. Lake Shore & M. S. Ry Co., 260 U. S. 261;
43 Sup. Ct. 106; 67 L. Ed. 244;
Lee vs Ches. & O. Ry. Company,
260 U. S. 653; 43 Sup. Ct. 230;
67 L. Ed. 443.

These decisions would be controlling and would dispense with any necessity of prolonging this brief further on this point. But, now, three times (in the brief before the Montana Supreme Court, in the objections there filed to a petition for a rehearing, and in the objections recently filed in this Court to the granting of a Writ of Certiorari) the plaintiffs have argued and cited authorities to the effect that this cause does not arise under any law of the United States and that the original venue provisions control removal proceedings also. Moreover, plaintiffs have carried the State Appellate Court with them. A proper respect for the State Appellate Court and a courtesy to opposing counsel seems, therefore, to justify enlarging the brief and setting the matter out more fully in the hope that quotations from cases and references to pages will effectually foreclose plaintiffs' unfounded arguments being repeated here a fourth time, or, if repeated, plaintiffs will undoubtedly feel it necessary to make some reply to quotations from decisions of this Court.

For these reasons there follows here:

(2)

A MORE DETAILED TEDIOUS CONDENSED ARGUMENT ON THE RIGHT OF REMOVAL.

First, as regards the case arising under the Commerce Laws:

The complaint showed an attempt to collect some $45,000 damages sustained to cattle in transit from Cody, Wyoming, on the Burlington Railroad, through the junction with the railroad of the Great Northern, your Petitioner, at Mossmain, Montana, to Seville, Montana, the action being brought against the terminal carrier over whose line it is alleged the damage occurred. The plaintiffs' argument that the interstate nature of the shipment or any reliance on any Federal law did not appear in the complaint itself comes with poor grace, as the complaint alleged that the Burlington issued a through bill of lading on which the shipment was moved (R. Par. IV, 2), and a new livestock contract issued by the Great Northern at Mossmain was excluded, when offered in evidence, on the ground that the original contract referred to in the complaint, necessarily completely controlled the entire movement (R. 31 to 34; 242), and the complaint charged confinement in cars, and a 36-hour release governed the movement (R. 34), and the plaintiffs also obtained a ruling that the interstate character of the action made void the limitation of value provided in the contract (R. 247 to 248).

As the shipment originated in Wyoming and was destined to Montana, though the terminal carrier movement was wholly in Montana, the liability was controlled by the Federal Interstate Commerce Law, which made the original contract controlling to destination, and imposed the duties and liabilities of the 28-hour law regarding unloading and resting and made void the limitation as to value, and otherwise, except as modified by other Federal statutes or by the shipping contract, adopted the common law as the Federal law defining the measure of duty and liability. The following authorities show that such a suit arises under the laws of the United States:

Adams Express Co. vs. Croninger,
226 U. S. 491; 57 L. Ed. 314; 33 Sup. Ct. 148;
Kas. City So. Ry. Co. vs. Carl,
33 Sup. Ct. 391; 227 U. S. 639; 57 L. Ed. 683;
G. F. & A. R. Co. vs. Blish Milling Co.,
241 U. S. 190; 60 L. Ed. 948; 36 Sup. Ct. 541;
C. & N. W. Ry. Co. vs. Whitnack Co.,
42 Sup. Ct. 328; 258 U. S. 369; 66 L. Ed. 665;
O. W. R. & N. Co. vs McGinn,
42 Sup. Ct. 332; 258 U. S. 409; 66 L. Ed. 689;
M. K. & T. Ry. Co. vs. Ward,
37 Sup. Ct. 617; 244 U. S. 383; 61 L. Ed. 1213;
Penn. Ry. Co. vs. Olivit,
37 Sup. Ct. 468; 243 U. S. 574; 61 L. Ed. 908;
C. & W. C. R. Co. vs. Varnville Furn. Co.,
237 U. S. 577; 59 L. Ed. 1137; 35 Sup. Ct. 715.

When it is said that an action against the terminal carrier arises at common law and not under a Federal law, it is overlooked that the Federal law defines the liability of all of the carriers in an interstate shipment; on all it imposes certain restrictions and duties by statute and increases the liability of the initial carrier beyond its own line and adopts the common law, except as modified by the 28-hour law, the shipping contract, and other provisions of the Interstate Commerce Act, as the measure of liability of the terminal carrier. This makes the common law on this subject a part of the Federal law adopted by reference.

From the Croninger case, supra, the following is quoted:

> "One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

From the Carl case, supra, the following is quoted:

> "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act."

Though the Supreme Court of the State was hurried into the error of citing only two *nisi prius* decisions in opposition apparently to the decisions of the tribunal of last resort, surely plaintiffs will not (as in the objections to the granting of a Writ of Certiorari) again cite these cases or ignore the express quotations just given.

As the case arose under the Federal law, and, indeed, under the Commerce laws, jurisdiction was conferred, as asserted in Petition for Removal, by the 8th subdivision of Section 991 of the Compiled Statutes, and removal was proper to the Federal Court of Montana irrespective of the venue provisions regarding suits originally brought in the Federal Court. The case of

> General Investment Co. vs. Lake Shore & M. S. Ry. Co., 43 Sup. Ct. 106; 260 U. S. 261; 67 L. Ed. 244,

is controlling.

But the Supreme Court ignored this decision, in its original opinion, on the ground that that case arose under the Federal law, but that the present case did not, and the Court declined to heed the language of the General Investment case, which was applicable to all removal cases, distinguishing venue from jurisdiction.

(*b*.)

However, diversity of citizenship was also urged as a ground of removal and hence, after the argument, to escape this threatened distinction being urged further, the case of

> Lee vs. Ches. & O Ry. Co., 260 U. S. 653; 43 Sup. Ct. 230; 67 L. Ed. 443,

was cited to the Court, but this case too was not heeded and, when pressed upon the Court in the Petition for Rehearing, the Court amended its opinion by adding a paragraph that these two cases did not overrule

> Smith vs. Lyon, 133 U. S. 315; 33 L. Ed. 635; 10 Sup. Ct. Rep. 303;
>
> Camp vs. Gress, 250 U. S. 308; 63 L. Ed. 997; 39 Sup. Ct. Rep. 478.

The cases of Smith vs. Lyons and Camp vs. Gress are, however, cases originally brought in a Federal court, and it is held that the venue provisions in regard to suits originally brought require that jurisdiction (not as regards the subject matter of the suit, but as a matter of venue or personal privilege) shall be denied unless all of the parties plaintiff, or all of the parties defendant, upon whose residence in a district the venue depends, are residents of that district. This related to jurisdiction as a matter of venue, not jurisdiction of the subject matter.

The old provision of the law was that, as regards the subject matter of suits to be brought in Federal courts, that is, as regards suits based on diverse citizenship, the suit must be between a citizen of the state where suit is brought and a citizen of another state. This was not a provision relating to venue, but one relating to jurisdiction of the subject matter; it limited jurisdiction over the subject matter of suits based on diversity of citizenship, to suits between citizens of the state where suit was brought and citizens of other states. This provision has been repealed. But in Smith vs. Lyon, the Court was called on to consider the venue provisions of the law, the provisions requiring suit to be brought in the district of the residence of the plaintiff or of the defendant. In determining the meaning of the singular word "plaintiff" or "defendant," in these venue provisions, the Court held it included the plural and construed the venue provisions as requiring residence in the district by all plaintiffs or by all defendants. In reaching this conclusion the Court clearly shows that it is considering jurisdiction so-called by way of venue and not jurisdiction of the subject matter, and the Court, merely by way of analogy, states that, ever since the decision in Strawbridge vs. Curtiss (7 U. S. 267; 2 L. Ed. 435), the similarly phrased provisions (in the singular number) of the old statute, relating to jurisdiction of the subject matter and confining diverse citizenship cases to cases of "suits between a citizen of the state where the suit is brought and a citizen of another state," had been construed as requiring all of the parties on one side to be citizens of the state where the suit was brought.

Now, Smith vs. Lyon expressly calls attention to the fact that this provision restricting jurisdiction of the subject matter had been repealed, but the Court held that the previous authorities on this statutory provision concerning jurisdiction of the subject matter were controlling, by way of analogy, in construing the somewhat similarly worded provisions of the statute concerning venue of suits originally brought in the Federal Court.

Again, in Camp vs. Gress, the Court expressly calls attention to the repeal of this old provision regarding jurisdiction of the subject matter, and expressly says that the Act of 1887-8 (and the Judicial Code) "did not restrict jurisdiction based on diversity of citizenship in those cases where the venue is determined by the residence of the plaintiff." And the Court distinctly says that where the parties are citizens of different states the Federal court has jurisdiction and the remaining question is not one of jurisdiction, but of venue and, again, in construing provisions expressly held to relate merely to venue regarding original suits, the Court cites with approval Smith vs. Lyons, saying that that case merely applied to the venue provisions the rule of the Strawbridge case construing former provisions concerning actual jurisdiction as distinguished from venue which were "similar in language and analogous in subject matter."

In both of these cases it is clear that the Court is considering not jurisdiction of the subject matter, but solely venue rights of parties as regards suits originally brought in the Federal courts, which rights the parties may waive, and the question as to whether there was a waiver was argued in these cases. As they concern only venue of suits originally brought, they are not in point at all on the question of jurisdiction on removal.

Of course, as stated by the Supreme Court of Montana, the General Investment case and the Lee case do not affect the cases of Smith vs. Lyon or Camp vs. Gress, for the two latter cases concern only venue in cases originally brought in Federal court, while the two former concern only venue in cases to be removed from State courts, and, under these two recent decisions, it is held that venue as to original proceedings has nothing to do with venue on removal. Moreover, THE SUPREME COURT OF THE STATE, in ruling that the two former cases are not controlling, HAS NOT HEEDED THE EXPRESS STATEMENT IN THE GENERAL INVESTMENT CASE (43 Sup. Ct 106 at 112, 1st paragraph) THAT THE DECISION IN CAMP vs. GRESS WAS BASED ON THIS VERY DISTINCTION.

The cases of

Tenn. vs. Bank, 152 U. S. 454; 14 Sup. Ct. 654;
Mexican National Bank vs. Davidson, 157 U. S. 201; 15 Sup. Ct. 563;
Cochran vs. Montgomery Co., 199 U. S. 260; 26 Sup. Ct. 58,

cited by the Supreme Court of the State, to the effect that a case to be removable must be one which could have originally been brought in a Federal court, are not in point, as these cases all relate to jurisdiction of the subject matter and not to venue.

Here again, after the citation of the General Investment Company case and of the Lee case, plaintiffs have twice (once in answer to the petition for a rehearing in the State Court, and here in opposition to a Writ of Certiorari) urged attention to these decisions. To avoid their being further pressed, attention may with propriety be called to the fact that THE SUPREME COURT OF THE STATE, IN CITING THESE DECISIONS (and counsel for the plaintiffs in pressing these decisions) HAS NOT HEEDED THE EXPRESS STATEMENT OF THIS COURT IN THE GENERAL INVESTMENT CASE (43 Sup. Ct. 106 at 114, 1st paragraph) TO THE EFFECT THAT THESE CASES ARE NOT IN POINT.

As the defendant here was a Minnesota citizen, and the plaintiffs were citizens of states other than Minnesota (Wyoming and Montana), there was jurisdiction of the subject matter of this suit as a controversy between citizens of different states, and this suit could have originally been brought in any Federal court, subject to a personal privilege in a defendant to object to the venue, but this would relate to venue in original proceedings and would have nothing to do with removal, the venue of which, on removal, would be the Federal court of the State where the suit was brought.

How, or why, the Lee and General Investment cases are not in point, or are not controlling, or how escape can be had from the cases beginning with Adams Exp. Co. vs. Croninger, or how, or why, the cases cited by the State Appellate Court, at plaintiffs' instance, are in point, has never been made to appear.

II.

DUTY TO CARE FOR THE ANIMALS IN TRANSIT.

It has been shown that the Trial Court refused defendant's requested instructions Nos. 27 and 27-A, imposing the general duty of caring for the animals in transit on the caretaker as required by the contract, and sustained the plaintiffs' objection that "there was a default on the part of the shipper and that the Act of Congress required the carrier to properly unload and feed the animals, in the event that the shipper did not, and on the ground that the defendant was assisting in unloading."

The defendant's requested instructions merely gave effect to the Federal statute.

Comp. St. 1918, Sec. 8651.

That these requested instructions correctly stated the law is shown by the following decisions:

A. T. & S. F. Ry. Co. vs. Merchants Livestock Co.,
273 Fed. 130;
Penn. R. Co. vs. Swift & Company,
258 Fed. 289;
Webster vs. U. Pac. Ry. Co.,
200 Fed. 597 at 599;
Starr vs. C. B. & Q. R. Co.,
173 N. W. 682;
Fluckinger vs. Chic. & N. W. Ry. Co.,
154 N. W. 865;
So. Ry. Co. vs. Tollerson,
68 S. E. 798.

Indeed, the decision of the Supreme Court of Montana may be cited in support of this error, for the Court says:

> "The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

The Court's decision thus amounts merely to a statement that though the refusal to give these instructions was error and the error was doubled because of error in the instructions given on the subject, this was apparently harmless error, because, in the Court's opinion, the unloading and care of the animals at Great Falls did not contribute to the damage.

But the Court has no right arbitrarily so to rule, for, up to the time of the close of the plaintiffs' case there was no question, in the actual admissions of the plaintiff's testimony, that the work of unloading, caring for and reloading the animals at Great Falls, was in charge of the shipper's caretaker, and no dispute existed that all of the duties of the care in this particular rested upon the shipper to determine what should be done and to supervise the hands that were admitted to be merely assisting him. But, with this testimony manifesting such neglect in supervision, the plaintiffs appreciated the seriousness of the case if the jury were permitted to consider the palpable cause of the plaintiffs' damage as a neglect of a duty resting upon the shipper and hence it was that, in the settlement of instructions, the plaintiffs changed front and urged literally that the caretaker's failure was so great as to amount to a default by the shipper and hence, that the duty fell upon the carrier to make good this default, and these objections were sustained.

IT IS CLEAR THAT IT WAS DEFENDANT'S CONTENTION, SUSTAINED BY THE PROOF, THAT A great deal of fatal damage had not occurred when the animals were unloaded at Great Falls, and IT WAS THE CARE OF THE ANIMALS IN GREAT FALLS AND THE SUDDEN ADMISSION OF THE

ANIMALS TO WATER THAT CAUSED THE DEATHS AND whatever additional damage was caused. Possibly there may have been a play for judgment either way in this particular. BUT THE CASE WAS SUBMITTED TO THE JURY ON THE BASIS THAT ANY MISTREATMENT AT GREAT FALLS, IN THE MATTER OF UNLOADING AND WATERING AND FEEDING THEM WAS A VIOLATION OF DUTY BY THE DEFENDANT, AND NOT A VIOLATION OF DUTY BY THE SHIPPER. THE JUDGMENT MAY FAIRLY BE CONSIDERED AS GROUNDED ON THE ERRORS IN THESE INSTRUCTIONS. These errors could not possibly be harmless.

We have shown the federal right especially claimed by the petitioner and that the Supreme Court of the State recognized the validity of the claim and then denied it, as a matter of procedure, under a declaration apparently that its denial did not affect the result, though how or why it did not affect the result is not stated.

Under the Federal decisions, however, if it is clear that when a Federal right is specifically set up and claimed, the Federal Court will not allow the State Court, under the guise of mere procedure, to deny the Federal right.

Atlantic Coast Line R. Co. vs. Burnette,
36 Sup. Ct. 75, 239, U. S. 199; 60 L. Ed. 226;
Ward vs. Love County,
253 U. S. 17; 64 L. Ed. 75; 40 Sup. Ct. 419.

III.

ERRORS ON BURDEN OF PROOF.

In this case we need not really consider upon whom rests the burden of proving negligence. The issue is a simple one as to whether, where the shipper accompanies the stock and is in charge thereof, is the burden of proof on him or on the carrier either as to negligence or to trace *the cause of damage* to some act or omission of the carrier. The animals are admitted to have become sick in transit. They were over-heated and the question is whether the deaths were due to any over-heating due to defendant's negligence, or were the deaths due to sickness caused by over-heating, or to sickness caused by the act of the shipper in handling them at Great Falls, and especially in admitting the animals too quickly to too much water while over-heated. Bear in mind that the animals were in the charge of the shipper all the time and, as fas as the claim for depreciation in the living animals is concerned, the animals were, for five days, taken away by the shipper from the railroad premises and exclusively in the custody of the shipper.

There is some little diversity of authority in the State decisions as to whether the burden of proof is on the carrier as to peculiar railroad matters, that is to say, to show that it was not negligent (10 Corpus Juris p. 379, Sec. 581). Where the issue is negligence and damage and its cause, following sickness, that is to say, damage and what acts or omissions (negligent or otherwise and by whomsoever done) caused the damage, the rule is stated in

10 Corpus Juris p. 380, as follows:

> "*Sickness of livestock:* An important limitation on the foregoing principles, recognized by some decisions and perfectly sound in principle, is that where a recov-

> ery is sought for the sickness of live stock in transit, or from death resulting from sickness, the burden is on plaintiff to prove the carrier's negligence."

Indeed, though there is some slight conflict in the state decisions, the great weight of authority is to the effect that, where the shipper accompanies a shipment of livestock, the burden of proof is on the shipper all along the line, that is to say, the burden of proof is then on the shipper to show (a) the damage sustained by the stock in transit and (b) what acts or omissions of the defendant caused this damage and (c) that these acts or omissions of the defendant were negligent. Where as is claimed here, there might be damage caused by acts of the shipper and by acts of the defendant, it might more correctly be said that the burden of proof was on the shipper to show (a) the entire damage sustained by the animals; (b) what acts or omissions caused the damage; (c) if some of these acts or omissions of the shipper, what part of the damage was caused by acts or omissions of the shipper and what part by acts or omissions of the carrier, and (d) that these acts or omissions of the carrier were negligent.

Thus from

10 Corpus Juris p. 381 and 382

we quote:

> "Where Owner assumes Care of Stock During Transportation aa. Burden of Showing Negligence of Carrier. Although there is some authority to the contrary, the general rule is that, where by special agreement the owner of stock or his agent accompanies the shipment for the purpose of giving care and attention to stock, the burden is on the owner, in an action for damages for loss or injury alleged to be

due to the negligence of the carrier, to prove that the loss or injury was the result of the carrier's negligence."

In the note to this text many cases are cited, from which we select the following:

Lane vs. Oregon Short Line R. Co.,
198 Pac. 671 (Ida.);
Zimmerman vs. Northern Pacific Ry. Co.,
167 N. W. 546 (Minn.);
Starr vs. C. B. & Q. R. Co.,
103 Neb. 645; 173 N. W. 682 at 683;
Bartelt vs. Ore. R. & N. Co.,
57 Wash. 16; 106 Pac 487 at 488;
135 Am. S. R. 959;
St. Louis & S. F. R. Co. vs. Wells,
81 Ark. 469, 99 S. W. 534 at 536;
Terre Haute & L. R. Co. vs. Sherwood,
132 Ind. 129; 31 N. E. 781, 32 Am. S. R.
239, 17 L. R. A. 339;
Mosteller vs. Iowa Cent. Ry. Co.,
153 Ia. 390, 133 N. W. 748 at 749.

The statements in the leading text books show the rule to be almost universal, and that the Montana decision in the Nelson case is almost without a companion.

5 Ruling Case Law,
Carriers, Sec. 462;
4 Elliott on Railroads,
3rd Ed. Sec. 2334 and 2338;
Mitchie on Carriers,
Section 2085;
3 Hutchinson on Carriers,
Sec. 1608.

The case of Nelson vs. G. N. Ry. Co., 28 Mont. 297, 72 Pac. 642, is contrary to the general rule and does not control in interstate shipments.

However, this matter is not subject to even slightly varying state decisions, as the shipment was an interstate shipment, for the following cases hold that the question of the burden of proof in interstate matters is a matter of substance and not of procedure and is not a subject of state decision but of general law to be decided by the Federal Courts and that the Federal rule is, in accordance with a whole host of authorities, to the effect that the burden of proof is on the shipper throughout where the caretaker accompanies the shipment:

Berry vs. C. & A. Ry. Co.,
  208 S. W. 622 at 623;
Baker vs. Schaff,
  211 S. W. 103 to 104;
Bland vs. C. & A. Ry. Co.,
  232 S. W. 268;
Neely vs. Hines,
  227 S. W. 650;
So. Pac. Ry. Co. vs. Prescott,
  240 U. S. 632, 60 L. Ed. 836;
  36 Sup. Ct. 469.

Likewise as regards damages due to negligence of the shipper, the burden of proof is on the shipper, to show that the damage was caused by the carrier. Here the greater part of the herd was in the exclusive possession of the shipper and was not again delivered to the railroad at Great Falls until after five days. The present case is an extreme case, for the same reason which required the shipper to prove the condition of animals at the time he delivered them to a railroad, required the shipper to prove the condition of the balance of the herd when he, in effect, redelivered them to the railroad at Great Falls. But in any case, where the shipper accompanies the stock under a contract to look after them, part of the burden of proving that damage was caused by acts of the carrier requires that the burden of proof shall be on the shipper to show the damage was so caused and not caused by the shipper's own acts. Hence, it was error to give Plaintiffs' Requested Instruction No. 5 (Tr. fol. 558).

From

10 Corpus Juris, p. 328,

we quote:

> "*Burden of Showing Absence of Negligence of Caretaker.* Where by agreement the shipper accompanies the stock for the purpose of taking care of it during transportation, the burden is on him in an action for loss or injury to show that such loss or injury was not due to any negligence on his part in the performance of the duties assumed by him, since he assumes duties as fully and explicitly as does the carrier."

We respectfully submit, therefore, that, as the evidence showed that the animals died or were damaged from an inherent want of vitality however caused, the instructions proposed by the plaintiffs (No. 3, 4, and 5; p. 244 to 246) were inapplicable to the case and were erroneous as placing the burden on the defendant, as was also the plaintiffs' proposed Instruction No. 3 (Tr. p. 244), given by the Court as the Court's Instruction No. 3 placing the burden further on the defendant to show whether the sickness was caused by acts of plaintiffs' caretaker during the transit.

Respectfully submitted,
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Office Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

No. [redacted] 138

GREAT NORTHERN RAILWAY CO., Petitioner,

vs.

GALBREATH CATTLE COMPANY and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices, et al., etc., Respondents.

BRIEF FOR RESPONDENTS.

E. E. ENTERLINE,
SAMUEL HERRICK,
Attorneys for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 541.

GREAT NORTHERN RAILWAY CO., PETITIONER,

vs.

GALBREATH CATTLE COMPANY AND ANNICE W. PHELPS AND FRANCES P. BELDEN, AS EXECUTRICES, ET AL., ETC., RESPONDENTS.

BRIEF FOR RESPONDENTS.

I.

CASE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF SUBJECT-MATTER.

This was not a suit arising under the Interstate Commerce Laws of the United States, but was merely one for damages to enforce a common-law liability. Section 6 of the complaint expressly absolves the original carrier from all liability whatsoever, while Sections 7 to 13, inclusive, set forth that the negligence causing the loss occurred wholly within the State of Montana and was chargeable solely to the single carrier made the defendant. There is no violation of the Interstate Commerce Laws alleged by the complaint, nor any reference made to those laws or to the regulations of the Interstate Commerce Commission.

Such action is not a suit arising under "any law regulating commerce" within the meaning of the Judicial Code (Act March 3, 1911, chap. 231, 36 Stat., 1092), of which the District Court, by paragraph 1, is given jurisdiction regardless of citizenship, nor as based on the so-called Carmack Amendment to Section 20 of the act, embodied in Act of June 29, 1906, chapter 3591, Section 7 (34 Stat., 593), requiring the issuance of bills of lading for interstate shipments, the purpose of which is to make the carrier issuing such bills liable thereunder by statute for any loss or damage occurring on connecting lines.

Though there was an allegation in the complaint that the shipment was from a point in Wyoming to a point in Montana, we find that the same allegation was made in the complaint made the basis of the Winn case (213 U. S., 458, 465), but this Court held, nevertheless, that "the cause of action itself is not based upon the Interstate Commerce Law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto."

In Storm Lake Tub and Tank Factory *vs.* Minneapolis & St. L. R. Co. (209 Fed., 895, 898), the petition set forth damages to a shipment from Storm Lake, Iowa, to St. Paul, Minnesota, and that defendant was engaged as a common carrier in the States of Iowa and Minnesota. The court ruled that "there is nothing in the petition of the plaintiff in this case that shows even remotely that the cause of action therein alleged is one arising under the Constitution or any law of the United States," and accordingly the motion to remand to the State court was allowed. The situation in the case at bar is almost identical, except that here the case was not removed in the first instance.

A similar decision was rendered in Adams *et al. vs.* Chicago Great Western R. R. Co. *et al.* (210 Fed. Rep., 362), notwithstanding the fact that the Carmack Amendment (*supra*) authorized a recovery against the initial carrier for loss sustained through the fault of any carrier whose line formed a part of the through route. The District Court relied upon Tennessee *vs.* Union Planters Bank (152 U. S., 454) and subsequent cases, because the fact that the suit arose under the law of the United States did not appear from the plaintiff's petition, and such omission cannot be supplied by the petition for removal or any subsequent pleading.

The rule in Tennessee *vs.* Union Planters Bank was followed in a large number of cases for removal cited in Louisville and N. R. Co. *vs.* Mottley (211 U. S., 149, 154).

A recent case to the same effect is Great Northern Ry Co. *vs.* Alexander (246 U. S., 276, 281, 282), in which there was the same defendant as in the present case, it was represented by the same attorney, and he advanced the same contention, but this Court, through Mr. Justice Clarke, thus ruled:

> "But unfortunately for the validity of this contention *it has been frequently decided by this Court* that whether a case arising, as this one does, under a law of the United States, is removable or not, when it is commenced (there being no claim of fraudulent

attempt to evade removal), *is to be determined by the allegations of the complaint or petition; and that if the case is not then removable, it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.* Tennessee *vs.* Union Planters Bank, 152 U. S., 454; 38 L. Ed., 511; 14 Sup. Ct. Rep., 654; Chappell *vs.* Waterworth, 155 U. S., 102; 39 L. Ed., 85; 15 Sup. Ct. Rep., 34; Texas & P. R. Co. *vs.* Cody, 166 U. S., 606; 41 L. Ed., 1132; 17 Sup. Ct. Rep., 703; Taylor *vs.* Anderson, 234 U. S., 74; 58 L. Ed., 1218; 34 Sup. Ct. Rep., 724.

* * * * * * *

"The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, *the plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case arising under a law of the United States,* when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, non-removable when commenced, shall afterwards become removable, depends not upon what the defendant may allege or prove, or what the Court may, after hearing upon the merits, *in invitum,* order, *but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.*" (Italics are ours, here and throughout this brief.)

The mere fact that the charge of negligence embraces, *inter alia,* a failure to comply with some of the Interstate Commerce Commission's regulations prescribed for the handling and storing of explosives does not make the controversy one arising under the laws of the United States, so as to give the Federal court exclusive jurisdiction thereof (Isaac Kubie Co. *vs.* Lehigh Valley R. Co., 261 Fed., 806, 810, citing Mo. Pacific Ry. Co. *vs.* Fitzgerald, 160 U. S., 556).

Accordingly we maintain that, so far as the subject-matter of this suit was concerned, it was not removable to the Federal court, and the Supreme Court of Montana was correct in so ruling.

II.

THIS CAUSE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF DIVERSITY OF CITIZENSHIP.

The complaint in this case shows, and the fact is undisputed, that the plaintiff Phelps was a citizen of the State of Wyoming, while the plaintiff Galbreath Cattle Company was a citizen of Montana and the defendant was a citizen of the State of Minnesota (R., 1, 2). For this reason we opposed the petition of the defendant for removal of this case to the Federal court, and the order of the trial court denying such petition was sustained by the Supreme Court of Montana on appeal (R., 8, 267, 279).

We urged below and still maintain that since the two plaintiffs were citizens of different States the case was controlled by the opinion of this court in Smith *vs.* Lyon (133 U. S., 315), holding that "where two plaintiffs are citizens of different States they cannot both unite in one suit in a State of which only one of them is a citizen," that being in accordance with "the long-continued construction of the statute by this court during a period of nearly a hundred years," beginning with that by Chief Justice Marshall in Strawbridge *vs.* Curtiss (3 Cranch, 267).

The opinion in Smith *vs.* Lyon was cited with approval and followed in the more recent case of Camp *vs.* Gress (250 U. S., 308), though the situation was somewhat different there, because there was but one plaintiff, while the defendants were citizens of different States. The distinction was made between such a case and the line of cases where the plaintiffs had diverse citizenship, but the principle followed in Smith *vs.* Lyon as to the latter line of cases was not departed from.

To the same effect was the decision of the District Court for the Western District of Washington in Puget Sound Sheet Metal Works *et al.* *vs.* Great Northern Ry. Co. (195 Fed., 350), in which the parties plaintiff were citizens of different States and the defendant was the same as the defendant here. The case had been removed to the Federal court from the Supreme Court of King County, Washington, on the diversity of citizenship, but after careful consideration of the opinions of this court in Smith *vs.* Lyon, *in re* Moore (209 U. S., 490), and *ex parte* Wisner (203 U. S., 449), Judge Hanford held that the case was not removable to the Federal court, and accordingly allowed the motion to remand. It does not appear that any appeal was taken from this decision, although the Great Northern Railway Company was represented by one of the same attorneys whom it now has in the case at bar.

Counsel for petitioner continues to cite and harp upon the recent decisions of this Honorable Court in General Investment Company *vs.* Lake Shore & M. S. Ry. Co. (43 Sup. Ct., 106) and Lee *vs.* Chesapeake & Ohio Ry. Co. (43 Sup. Ct., 230). We have studied these opinions carefully, but urge that they do not apply here. The former was removed to the Federal court on the ground that the suit, *"according to the claim made in the bill, was one arising under the laws of the United States,"* and while "diversity of citizenship was shown (it was) not specified as a ground of removal." On the contrary, the present suit was not brought under the laws of the United States, nor was any reference whatever made to those laws in the complaint, as we have shown above.

However, assuming for the purpose of argument that these recent decisions might have application here, we respectfully urge that to reverse and remand this case by reason thereof would cause a great injustice, because they were not rendered until years after this case was tried. The trial court refused removal of the instant case to the Federal court upon authority of the opinions of this Court rendered during a period of 110 years, or from Strawbridge *vs.* Curtiss (*supra*) to Camp *vs.* Gress (*supra*), and such refusal was undoubtedly correct under that long line of decisions. The case was very fully tried and considered, an extremely lengthy record being made up, and the same has been printed, both in the Supreme Court of Montana and in this Honorable Court, at great expense. One of the plaintiffs, who was also an important witness, has died, and probably the testimony of one or more of the witnesses would not be available because of death or removal. Accordingly a new trial after the lapse of all these years would result in great hardship to the parties plaintiff.

The language of Mr. Justice Brewer in one of the above removal cases (*Re* Moore, 209 U. S., 490, 508) is quite pertinent here, namely:

> "We might also refer to the several textbooks in which is affirmed the general doctrine of the effect of the waiver of an objection to a particular court in

> which the suit has been removed. We have made these many quotations and references, not simply to establish the doctrine itself, *but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule;* for if, in a case between citizens of different States, of which the circuit courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, *resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.*"

While this language applied to a refusal of the Federal court to which a case had been removed to remand it to the State court, the principle applies just as well here. There is the same risk of disappearance of witnesses, there is already a loss of important testimony, and there would be the same injurious results from ordering this case removed to and retried in a Federal court after this lapse of years, and solely because of decisions rendered some years after the case had been tried in and removal properly refused by the State court.

The petitioner complains that the Supreme Court of Montana refused to follow the General Investment Company and Lee cases, although same were brought to its particular attention, one of them on the original argument and both on the petition for rehearing. We believe that court was right in so refusing and in holding the present case controlled by the decisions in Smith *vs.* Lyons and Camp *vs.*

Gress; but if not, it remains a fact that the instant case had long since been heard by the trial court and the entire record of evidence made up, so that to allow the petition for removal would have been merely to invite those "widespread injurious results" which Mr. Justice Brewer so ably describes in the Moore case (*supra*).

In other words, at the time the State court denied the petition for removal, it could not do otherwise than follow the rulings of the Supreme Court of the United States rendered during a period of more than a century. Not only were the General Investment Company and Lee decisions not then printed or rendered, but the earlier decisions were still in force and even *Ex parte* Wisner and *In re* Moore (*supra*) were not expressly overruled by this Honorable Court, as held by District Judge Hanford in Puget Sound Sheet Metal Works *et al. vs.* Great Northern Ry. Co. (195 Fed. Rep., 350), citing *Ex parte* Harding (219 U. S., 363). And even in the dissenting opinion of Mr. Chief Justice Fuller in the Moore case (209 U. S., 490, 508) there was a concurrence in the opinion of the majority that the plaintiff could not by his assent invest the court with jurisdiction.

We also understand that Judge Bourquin, of the United States District Court for the District of Montana, had been consistently holding, prior to the ruling by the trial court in the instant case, that cases involving plaintiffs who did not both reside in the State were not removable, and consequently the trial court followed his rulings as well as those of the highest court in the land. The fact that there may have been a change several years later, and just prior to the decision of the Supreme Court of Montana on motion for rehearing (which we do not admit), does not demonstrate that the trial court acted erroneously in refusing to allow removal of this case in August, 1919. This case, we respectfully urge, should be adjudicated on the point of removal by the conditions then existing and in the light of the long line of decisions then in full force and effect, rather than upon the possible change of rulings which came about several years later. The trial court was then duly authorized to deny the petition for removal, and the plaintiffs in the case (respondents here) should not be penalized even if the Lee and Investment Company cases be construed as overturning all the prior Federal decisions.

As to the case of Central Coal and Coke Company *vs.* Oecpek (67 Law Ed., 480, 823), these are only memorandum decisions, and hence we are not aware whether they apply or not. However, from the title it is apparent that there is only one plaintiff and one defendant in that case, so they cannot have any close application here.

We therefore maintain that on the point of diversity of citizenship this case was not removable, and the Supreme Court of Montana correctly so held.

III.

NO OTHER FEDERAL QUESTION INVOLVED.

In its petition and accompanying brief the Great Northern Railroad Company has entered upon a rather elaborate argument upon the merits of the case. We shall not follow it in this, as that would seem not involved in the question whether the petition for certiorari should be granted. We argued the merits at some length in our brief submitted last year when the case was before this Court previously (No. 312, October term, 1923), and if necessary can refer to pages 6 to 18 of that brief.

However, we cannot refrain from pointing out that the petitioner's claim that the loss of cattle was mainly due to failure to give the animals care at Great Falls is wholly incorrect and inconsistent with the theory upon which the case was tried by it, that theory being that the cattle were not properly handled and watered before being loaded at Cody. This theory was followed by it in the trial of the case and established by its examination of the expert veterinary witnesses placed upon the stand.

Petitioner has based an elaborate argument upon the court's refusal to give his requested instructions Nos. 27 and 27A with regard to the general duty of caring for the animals in transit, but we suggest that he has unconsciously misstated or given the wrong effect to that portion of the record. The court did not directly charge that it was the duty of defendant to unload, feed, and water the cattle, but merely that *if* the defendant undertook to and did unload the cattle, "then it was the duty to unload the cattle in a humane manner into pens properly equipped for rest, water, and feeding." There surely was evidence introduced from which the jury could find that the defendant entered into such undertaking without request from anyone, and that not only did it assist in the unloading, but took charge of the unloading and watering. The caretaker assisted in this work, though protesting at the brutality shown by defendant's employees and trying to prevent such brutality.

Accordingly the authorities cited by the petitioner are not in point here, but there are others holding that where the shipper defaults in unloading, whereupon the carrier unloads and makes a charge for feeding, the shipper can recover any damages sustained in such operations (Chicago, R. I. & P. R. Co. *vs.* Scott (Texas), 156 S. W., 294; Snyder *vs.* King (Mich.), 165 N. W., 840; I. A. R. L., 893; Gilbert *vs.* C., R. I. & P. Ry. Co., 132 Mo. App., 697, 122 S. W., 1002; Pecos & Northern Tex. R. Co. *vs.* Meyer (Texas), 155 S. W., 309, 6 N. C. C. A., 146).

There are also decisions that the carrier must take reasonable precaution against delay in handling shipments of live stock and must anticipate probable results from weather conditions that may be foreseen (Chicago, B. & Q. R. Co. *vs.* Simpson Bros., 23 Wyo., 342, 151 Pac., 902; Nelson *vs.* Great Northern R. Co., 28 Mont., 297).

It is true that the Supreme Court of Montana found error in plaintiff's requested instruction No. 8, but only in the final clause, namely, "while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana." However, after eliminating from consideration that fact, and also the loss of the thirteen head of cattle which died after the reshipment from Great Falls, the court found itself confronted with the situation (R., 277) "that as to the remaining 142 head there was a direct conflict in the testimony upon all of the alleged negligent acts of the defendant and the alleged acts of contributory negligence on the part of the plaintiffs. These matters were all thoroughly tried and submitted to the jury for their determination under proper and sufficient instructions. The jury resolved these issues in favor of the plaintiffs. From the record, we cannot say that their finding in that respect was against the weight of the evidence." For these reasons the alleged error in part of the instructions was not a prejudicial one, so as to necessitate a new trial, especially in view of the court's requirement for plaintiffs to consent to reduction of the judgment in the sum of $1,020.

The petitioner contends that the court's instructions placed the burden of proof upon the defendant, but we urge that this is not justified. As above stated, the court merely instructed the jury that *if* the carrier undertook to and did unload the cattle, then they should have done it in a proper and humane manner.

So, by plaintiff's requested instruction No. 11, the court advised that *if* you find for the plaintiff and *if* you find that the loss and injuries to the cattle were caused by negligence of the defendant you should award damages (R., 249).

Furthermore, by the giving of defendant's requested instructions Nos. 2, 4, 8, 10, 13, 15, 16, 19, 21, 22, and 25 the jury was instructed not to render verdict for plaintiff unless they found that the damage was due to the sole negligence of defendant, and was not due to hard driving or feeding before loading, nor to the animals being too heavily loaded in the cars, nor to their being in poor shipping condition, nor to their being overheated before delivery to the defendant's carrier in Montana, nor to any act of contributory negligence on the part of plaintiffs or their agents.

And, finally, the jury was instructed, as requested in defendant's offered instruction No. 1, that "*the burden rests upon the plaintiffs to prove the essential elements of their complaint by a fair preponderance of the proofs, and that therefore in this case plaintiffs must establish by such preponderance of proof, not only that the defendant was negli-*

gent, but also that such negligence, if any, was the direct and proximate cause of plaintiff's damage, if any."

Surely these instructions do not place the burden of proof upon defendant, as argued here on his behalf, but instead protect carefully every right he had in the case. Some of the instructions, being based on partial defenses, although no partial defense was pleaded, should not have been given, in our opinion (McKin *vs.* Beiseker, 56 Mont., 330, 185 Pac., 153; Cornell *vs.* Great Northern R. Co., 57 Mont., 177; 187 Pac., 902); however, we made no objection to them, and hence defendant had the benefit of them. Everything considered, he has no just cause of complaint against any instruction in this case given to the jury (Moyse *vs.* Northern Pacific R. Co., 41 Mont., 272; 108 Pac., 1062).

Finally, the court's instructions on the burden of proof were in accordance with the ruling in that State, as laid down in the case of Nelson *vs.* Great Northern Ry. Co. (28 Mont., 297) and in the later case of Heitman *vs.* Chicago, Milwaukee & St. Paul R. Co. (45 Mont., 406).

We therefore maintain that no Federal question can be conjured out of the instructions to the jury or the refusal of instructions requested by petitioner or the rulings of the Supreme Court of Montana thereon. In this connection we refer to the recent opinion of this Court in Petrie *vs.* Nampa and M. Irrig. Dist. (248 U. S., 154) to the effect that "even if it be conceded that the supreme court decided a Federal question against the plaintiffs in error, nevertheless, the court decided against them also upon an independent ground, not involving any Federal question and broad enough to support the judgment, and for this reason the Federal question involved will not be considered on this writ of error, under a series of decisions by this Court, extending at least from Klinger *vs.* Missouri, 13 Wall., 257, 263; 20 L. Ed., 635, 637, to Enterprise Irrig. Dist. *vs.* Farmers' Mut. Canal Co., 243 U. S., 157, 164; 61 L. Ed., 644, 648; 37 Sup. Ct. Rep., 318."

We do not by this citation admit that there was any Federal question involved here.

Finally, we wish to answer briefly the contention of petitioner that the delays which have occurred in this case have been in any way our fault; this being evidently an attempt on their part to answer our contention as to the injustice which would be caused respondents by a removal of this cause to the Federal court for trial after all these years, and to our quotation of Mr. Justice Brewer's language in the Moore decision (*supra*). Certainly it is rather gratuitous for petitioner to urge that the respondents are responsible for the delays. At the time he commenced proceedings for the purpose of securing a writ of certiorari he should have been familiar with the numerous holdings of this Court and all the Federal courts that an appeal or writ of error could be taken only from a *final* decision. He should also be familiar with the rulings of the Supreme Court of Montana to the effect that "an appeal from a judgment of the court below, entered in conformity to the judgment and order of the supreme court on a former appeal will be dismissed, as being in effect an appeal from the supreme court's own judgment" (Kimpton *vs.* Jubilee Placer Co., 22 Mont., 107). To the same effect are the rulings of the Federal courts (Stewart *vs.* Salamon, 97 U. S., 361) and other decisions cited in the Kimpton case (*supra*). In this connection we note that petitioner is evidently unaware whether he is seeking a writ from the judgment of the District Court of Yellowstone County or from the Supreme Court of Montana. (See page 5 of petition.)

Petitioner also urges that we are partly responsible for the delays because we argued *before* the Supreme Court of Montana that the Lee and Investment Company cases should not be followed, but, as above set forth, the case had previously been tried at great expense under the decisions previously in force, and we were fully justified in arguing against a removal and retrial on the strength of later decisions.

Finally, petitioner appears to argue that because his previous writ was granted this one should be also. We urge, however, that in our brief opposing the allowance of the writ we urged the same point upon which the case after allowance of the writ was dismissed, namely, that the decision below cited was not a final one. As this was evidently not considered by the court in allowing the former writ, we respectfully suggest that its decision on the other points should not necessarily be followed, but that the case be considered as though no previous writ had been granted.

We respectfully contend that the petition sets up no good ground for the allowance of the writ of certiorari, and hence pray that such writ be denied.

Respectfully submitted,

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Office Supreme Court, U. S.
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IN THE

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BRIEF OF RESPONDENTS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 138.

GREAT NORTHERN RAILWAY CO., PETITIONER,

vs.

GALBREATH CATTLE COMPANY AND ANNICE W. PHELPS AND FRANCES P. BELDEN, AS EXECUTRICES, ET AL., ETC., RESPONDENTS.

BRIEF OF RESPONDENTS.

I.

CASE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF SUBJECT-MATTER.

This was not a suit arising under the Interstate Commerce Laws of the United States, but was merely one for damages to enforce a common-law liability. Section 6 of the complaint expressly absolves the original carrier from all liability whatsoever, while Sections 7 to 13, inclusive, set forth that the negligence causing the loss occurred wholly within the State of Montana and was chargeable solely to the single carrier made the defendant. There is no violation of the Interstate Commerce Laws alleged by the complaint, nor any reference made to those laws or to the regulations of the Interstate Commerce Commission.

Such action is not a suit arising under "any law regulating commerce" within the meaning of the Judicial Code (Act March 3, 1911, chap. 231, 36 Stat., 1092), of which the District Court, by paragraph 1, is given jurisdiction regardless of citizenship, nor as based on the so-called Carmack Amendment to Section 20 of the act, embodied in Act of June 29, 1906, chapter 3591, Section 7 (34 Stat., 593), requiring the issuance of bills of lading for interstate shipments, the purpose of which is to make the carrier issuing such bills liable thereunder by statute for any loss or damage occurring on connecting lines.

Though there was an allegation in the complaint that the shipment was from a point in Wyoming to a point in Montana, we find that the same allegation was made in the complaint made the basis of the Winn case (213 U. S., 458, 465), but this Court held, nevertheless, that "the cause of action itself is not based upon the Interstate Commerce Law or upon any other law of the United States. The case could not have been brought originally in the Circuit Court of the United States, and was therefore not removable thereto."

In Storm Lake Tub and Tank Factory *vs.* Minneapolis & St. L. R. Co. (209 Fed., 895, 898), the petition set forth damages to a shipment from Storm Lake, Iowa, to St. Paul, Minnesota, and that defendant was engaged as a common carrier in the States of Iowa and Minnesota. The court ruled that "there is nothing in the petition of the plaintiff in this case that shows even remotely that the cause of action therein alleged is one arising under the Constitution or any law of the United States," and accordingly the motion to remand to the State court was allowed. The situation in the case at bar is almost identical, except that here the case was not removed in the first instance.

A similar decision was rendered in Adams *et al. vs.* Chicago Great Western R. R. Co. *et al.* (210 Fed. Rep., 362), notwithstanding the fact that the Carmack Amendment (*supra*) authorized a recovery against the initial carrier for loss sustained through the fault of any carrier whose line formed a part of the through route. The District Court relied upon Tennessee *vs.* Union Planters Bank (152 U. S., 454) and subsequent cases, because the fact that the suit arose under the law of the United States did not appear from the plaintiff's petition, and such omission cannot be supplied by the petition for removal or any subsequent pleading.

The rule in Tennessee *vs.* Union Planters Bank was followed in a large number of cases for removal cited in Louisville and N. R. Co. *vs.* Mottley (211 U. S., 149, 154).

A recent case to the same effect is Great Northern Ry. Co. *vs.* Alexander (246 U. S., 276, 281, 282), in which there was the same defendant as in the present case, it was represented by the same attorney, and he advanced the same contention, but this Court, through Mr. Justice Clarke, thus ruled:

> "But unfortunately for the validity of this contention *it has been frequently decided by this Court* that whether a case arising, as this one does, under

> a law of the United States, is removable or not, when it is commenced (there being no claim of fraudulent attempt to evade removal), *is to be determined by the allegations of the complaint or petition; and that if the case is not then removable, it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.* Tennessee *vs.* Union Planters Bank, 152 U. S. 454; Chappell *vs.* Waterworth, 155 U. S., 102; Texas & P. R. Co. *vs.* Cody, 166 U. S., 606; Taylor *vs.* Anderson, 234 U. S., 74.
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> * * * * * * *
>
> "The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the *plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case arising under a law of the United States,* when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, non-removable when commenced, shall afterwards become removable, depends not upon what the defendant may allege or prove, or what the Court may, after hearing upon the merits, *in invitum,* order, *but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."* (Italics are ours, here and throughout this brief.)

The mere fact that the charge of negligence embraces, *inter alia,* a failure to comply with some of the Interstate Commerce Commission's regulations prescribed for the handling and storing of explosives does not make the controversy one arising under the laws of the United States, so as to give the Federal court exclusive jurisdiction thereof (Isaac Kubie Co. *vs.* Lehigh Valley R. Co., 261 Fed., 806, 810, citing Mo. Pacific Ry. Co. *vs.* Fitzgerald, 160 U. S., 556).

And in the recent case of Oregon-Washington R. & Nav. Co. *vs.* McGinn (258 U. S., 409, 413), it was held by this court through Mr. Justice Clarke that "the Cummins Amendment to the Carmack Amendment to the Interstate Commerce Act deals with and modifies *the common-law liability only of the initial carrier.* It * * * *leaves the relation of all connecting carriers,* including the terminal carrier, to the shipper or consignee and to each other, *entirely unaffected* (Atlantic Coast Line R. Co. *vs.* Riverside Mills, 219 U. S., 186; Adams Exp. Co. *vs.* Croninger, 226 U. S., 491); and therefore their liability is as we have stated it, unless modified by contract, and in this case, as we have seen, the livestock contract under which the shipment moved, * * * *leaves the common-law liability of the intermediate carrier entirely unaffected, just as the statute leaves it.*" These words apply with equal strength to the facts of the present case, and demonstrate that the Carmack Amendment has no application to the common-law liability made the subject of this action.

Accordingly we maintain that, so far as the subject-matter of this suit was concerned, it was not removable to the Federal court, and the Supreme Court of Montana was correct in so ruling.

II.

THIS CAUSE NOT REMOVABLE TO FEDERAL COURT ON GROUND OF DIVERSITY OF CITIZENSHIP.

The complaint in this case shows, and the fact is undisputed, that the plaintiff Phelps was a citizen of the State of Wyoming, while the plaintiff Galbreath Cattle Company was a citizen of Montana and the defendant was a citizen of the State of Minnesota (R., 1, 2). For this reason we opposed the petition of the defendant for removal of this case to the Federal Court, and the order of the trial court denying such petition was sustained by the Supreme Court of Montana on appeal (R., 8, 267, 269).

We urged below and still maintain that since the two plaintiffs were citizens of different States the case was controlled by the opinion of this court in Smith *vs.* Lyon (133 U. S., 315), holding that "where two plaintiffs are citizens of different States they cannot both unite in one suit in a State of which only one of them is a citizen," that being in accordance with "the long-continued construction of the statute by this court during a period of nearly a hundred years," beginning with that by Chief Justice Marshall in Strawbridge *vs.* Curtiss (3 Cranch, 267).

The opinion in Smith *vs.* Lyon was cited with approval and followed in the more recent case of Camp *vs.* Gress (250 U. S., 308), though the situation was somewhat different there, because there was but one plaintiff, while the defendants were citizens of different States. The distinction was made between such a case and the line of cases where the plaintiffs had diverse citizenship, but the principle followed in Smith *vs.* Lyon as to the latter line of cases was not departed from.

To the same effect was the decision of the District Court for the Western District of Washington in Puget Sound Sheet Metal Works *et al.* *vs.* Great Northern Ry. Co. (195 Fed., 350), in which the parties plaintiff were citizens of different States and the defendant was the same as the defendant here. The case had been removed to the Federal court from the Supreme Court of King County, Washington, on the diversity of citizenship, but after careful consideration of the opinions of this court in Smith *vs.* Lyon, *in re* Moore (209 U. S., 490), and *ex parte* Wisner (203 U. S., 449), Judge Hanford held that the case was not removable to the Federal court, and accordingly allowed the motion to remand. It does not appear that any appeal was taken from this decision, although the Great Northern Railway Company was represented by one of the same attorneys whom it has had in the case at bar.

Counsel for petitioner continues to cite and rely upon the recent decisions of this Honorable Court in General Investment Company *vs.* Lake Shore & M. S. Ry. Co. (260 U. S., 261) and Lee *vs.* Chesapeake & Ohio Ry. Co. (260 U. S., 653). We have studied these opinions carefully, but urge that they do not apply here. The former was removed to the Federal court on the ground that the suit, "*according to the claim made in the bill, was one arising under the laws of the United States,*" and while "diversity of citizenship was shown (it was) not specified as a ground of removal"; while, on the contrary, the present suit was not brought under the laws of the United States, nor was any reference whatever made to those laws in the complaint, as we have shown above. And as to the Lee case, that involved only a single plaintiff and a single defendant, hence is entirely different as to citizenship from the case at bar.

However, assuming for the purpose of argument that these recent decisions do have application here, we respectfully urge that to reverse and remand this case by reason thereof would cause a great injustice, because they were not rendered until years after this case was tried. The trial court refused removal of the instant case to the Federal court upon authority of the opinions of this Court rendered during a period of 110 years, or from Strawbridge *vs.* Curtiss (*supra*) to Camp *vs.* Gress (*supra*), and such refusal was undoubtedly correct under that long line of decisions. The case was very fully tried and considered, an extremely lengthy record being made up, and the same has been printed, both in the Supreme Court of Montana and in this Honorable Court, at great expense. One of the plaintiffs, who was also an important witness, has died, and probably the testimony of one or more of the witnesses would not be available because of death or removal. Accordingly a new trial after the lapse of all these years would result in great hardship to the parties plaintiff.

The language of Mr. Justice Brewer in one of the above removal cases (*Re* Moore, 209 U. S., 490, 508) is quite pertinent here, namely:

> "We might also refer to the several textbooks in which is affirmed the general doctrine of the effect of the waiver of an objection to a particular court in which the suit has been removed. We have made these many quotations and references, not simply to

> establish the doctrine itself, *but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule;* for if, in a case between citizens of different States, of which the circuit courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, *resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.*"

While this language applied to a refusal of the Federal court to which a case had been removed to remand it to the State court, the principle applies just as well here. There is the same risk of disappearance of witnesses, there is already a loss of important testimony, and there would be the same injurious results from ordering this case removed to and retried in a Federal court after this lapse of years, and solely because of decisions rendered some years after the case had been tried in and removal properly refused by the State court.

As held by the Supreme Court of Wyoming in the case of Kelly *vs.* Rhoades, County Assessor (7 Wyo., 237, 279),

> "The effect of a decision of the Supreme Court construing a statute, renders it the law for the time being as so construed. *Parties have a right to act upon such a decision and no injury ought to be allowed to result, by reason of a dependence thereon,*

> *if the decision is subsequently changed, any more than in case of a repeal of a statute.* Hollinshead *v.* Von Glahr, 4 Minn., 190. Until the decision now rendered, since the announcement of the Court in the cases hereinbefore referred to, the law of the State has been as set forth and adjudged in those cases, at least to the extent that no one should be injured by relying thereon. *Consequently, any case which has been brought against the collecting officer in his individual capacity, should be permitted to proceed without objection on that ground.* This case is not against the officer individually."

An interpretation which gives to a law, an order of a department or a decision of a Court the vicious effect of retrospective action should always be carefully avoided.

Jeedicke *vs.* U. S., 85 F., 372 at 375.

And the following language of Mr. Justice Sanborn when on the Eighth Circuit Court of Appeals is also apropos, to-wit:

> "Neither courts nor legislatures should give a retrospective effect to radical changes in rules of property or of practice." Again,—"It is a maxim of the law 'that an act of court should prejudice no man.'" (Shreve *vs.* Cheesman, 69 Fed., 785, 792.)

The petitioner complains that the Supreme Court of Montana refused to follow the General Investment Company and Lee cases, although same were brought to its particular attention, one of them on the original argument and both on the petition for rehearing. Without arguing that said court was right in so refusing and in holding the present case controlled by the decisions in Smith *vs.* Lyons and Camp *vs.*

Gress, it remains a fact that the instant case had long since been heard by the trial court and the entire record of evidence made up, so that to allow the petition for removal would have been merely to invite those "widespread injurious results" which Mr. Justice Brewer so ably describes in the Moore case (*supra*).

In other words, at the time the State court denied the petition for removal, it could not do otherwise than follow the rulings of the Supreme Court of the United States rendered during a period of more than a century. Not only were the General Investment Company and Lee decisions not then printed or rendered, but the earlier decisions were still in force and even *Ex parte* Wisner and *In re* Moore (*supra*) were not expressly overruled by this Honorable Court, as held by District Judge Hanford in Puget Sound Sheet Metal Works *et al.* *vs.* Great Northern Ry. Co. (195 Fed. Rep., 350), citing *Ex parte* Harding (219 U. S., 363). And even in the dissenting opinion of Mr. Chief Justice Fuller in the Moore case (209 U. S., 490, 508) there was a concurrence in the opinion of the majority that the plaintiff could not by his assent invest the court with jurisdiction.

We also understand that Judge Bourquin, of the United States District Court for the District of Montana, had been consistently holding, both before and after the ruling by the trial court in the instant case, that cases involving plaintiffs who did not both reside in the State were not removable, and consequently the trial court followed his ruling as well as those of the highest court in the land. To the same effect was Boise Commercial Club *vs.* Oregon Short Line Ry. Co. (260 F., 769), a decision of the Ninth Circuit Court of Appeals, in which Montana is included. That decision, of course, was rendered in October, 1919, and the denial of the removal here was entered in July, 1919, although the case was not tried until December, 1920. Yet it is quite evident that if this case had been removed to the Federal Court for the District of Montana, Judge Bourquin would have remanded it. The fact that there may have been a change several years later, and just prior to the decision of the Supreme Court of Montana on motion for rehearing, does not demonstrate that the trial court acted erroneously in refusing to allow removal of this case in August, 1919. This case, we respectfully urge, should be adjudicated on the point of removal by the conditions then existing and in the light of the long line of decisions then in full force and effect, rather than upon the possible change of rulings which came about several years later. The trial court was then duly authorized to deny the petition for removal, and the plaintiffs in the case (respondents here) should not be penalized even if the Lee and Investment Company cases be construed as overturning all the prior Federal decisions.

It has been the uniform holding of the Supreme Court of the United States that the State courts are bound to follow the construction placed by that Court upon a Federal statute. The District Court of Yellowstone County, Montana, was therefore within its legal right in denying the application to remove—indeed it was the duty of that Court to deny the application because according to the then existing decisions the Federal Court for the District of Montana would have been compelled to remand the cause to the State court, so that such removal would have simply caused delay in the trial. We earnestly urge that the respondents in this case should not now be penalized by reason of the State court following the decisions of the United States Supreme Court and of the lower Federal courts, and that if ever the principles announced by Judge Brewer in *In re* Moore should be followed, they should be in the instant case.

Decisions of a court of last resort are to be regarded as law, and should be followed by inferior courts whatever the view of the latter may be as to their correctness, until they have been reversed or overruled. 15 C. J., 1920.

We therefore maintain that on the point of diversity of citizenship this case was not removabie, and the Supreme Court of Montana correctly so held.

III.

NO OTHER FEDERAL QUESTION INVOLVED.

In its petition and accompanying brief the Great Northern Railroad Company has entered upon a rather elaborate argument upon the merits of the case. We shall not follow it in this, as we argued the merits at some length in our brief submitted when the case was before this Court previously (No. 312, October term, 1923), and if necessary can refer to pages 6 to 18 of that brief.

However, we cannot refrain from pointing out that the petitioner's claim that the loss of cattle was mainly due to failure to give the animals care at Great Falls is wholly incorrect and inconsistent with the theory upon which the case was tried by it, *i. e.*, that the cattle were not properly handled and watered before being loaded at Cody (R., 118 *et seq.*). This theory was followed by it in the trial of the case and established by its examination of the expert veterinary witnesses placed upon the stand (R., 172 *et seq.*), especially the concluding part of Dr. Nutting's testimony (R., 173-187).

At pages 181 to 183 of the record there is a report that Dr. Knowles had prepared and sought vainly to get the plaintiff's veterinarian to sign; and testimony which conclusively establishes that the defendant endeavored to prove that the damage was done at Cody before loading, because in the concluding paragraph these two veterinarians for defendant conclude that the disease and death of the cattle at Great Falls was *wholly* due to the alleged neglect and improper way in which they were handled previous to the time they were loaded on the cars at Cody.

Dr. Knowles in his direct examination also placed the responsibility upon the plaintiff's methods of handling the cattle before loading (R., 193, 194, 198). Dr. Embree and the other veterinarian (R., 209, 211) conclude that the animals were "scared" when they were first put under a roof in the cars, and that this, together with the manner in which they were handled at Cody, brought on circulatory disturbances.

Learned counsel who prepared the brief for defendant, both in this court and in the Supreme Court of Montana, ignored this testimony given by his own veterinarians. But the fact remains that the case was tried by defendant on the theory that the damages occurred prior to and at the time of the loading of the cattle at Cody, and that there has been a change of front evidently for the purpose of making capital out of one of the charges to the jury with regard to the unloading and care of the cattle at Great Falls.

Petitioner has based an elaborate argument upon the court's refusal to give his requested instructions Nos. 27 and 27A with regard to the general duty of caring for the animals in transit, but we suggest that he has unconsciously misstated or given the wrong effect to that portion of the record. The court did not directly charge that it was the duty of defendant to unload, feed, and water the cattle, but merely that *if* the defendant undertook to and did unload the catle, "then it was the duty to unload the cattle in a humane manner into pens properly equipped for rest, water, and feeding." There surely was evidence introduced from which the jury could find that the defendant entered into such undertaking without request from anyone, and that not only did it assist in the unloading, but took charge of the unloading and watering. The caretaker assisted in this work, though protesting at the brutality shown by defendant's employees and trying to prevent such brutality.

Accordingly, the authorities cited by the petitioner are not in point here, but there are others holding that where the shipper defaults in unloading, whereupon the carrier unloads and makes a charge for feeding, the shipper can recover any damages sustained in such operations (Chicago, R. I. & P. R. Co. *vs.* Scott (Texas), 156 S. W., 294; Snyder *vs.* King (Mich.), 165 N. W., 840; 1 A. R. L., 893; Gilbert *vs.* C., R. I. & P. Ry. Co., 132 Mo. App., 697, 122 S. W., 1002; Pecos & Northern Tex. R. Co. *vs.* Meyer (Texas), 155 S. W., 309, 6 N. C. C. A., 146).

There are also decisions that the carrier must take reasonable precaution against delay in handling shipments of live stock and must anticipate probable results from weather conditions that may be foreseen (Chicago, B. & Q. R. Co.

vs. Simpson Bros., 23 Wyo., 342, 151 Pac., 902; Nelson *vs.* Great Northern R. Co., 28 Mont., 297).

It is true that the Supreme Court of Montana found error in plaintiff's requested instruction No. 8, but only in the final clause, namely, "while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana." However, after eliminating from consideration that fact, and also the loss of the thirteen head of cattle which died after the reshipment from Great Falls, the court found itself confronted with the situation (R., 275) "that as to the remaining 142 head there was a direct conflict in the testimony upon all of the alleged negligent acts of the defendant and the alleged acts of contributory negligence on the part of the plaintiffs. These matters were all thoroughly tried and submitted to the jury for their determination under proper and sufficient instructions. The jury resolved these issues in favor of the plaintiffs. From the record, we cannot say that their finding in that respect was against the weight of the evidence." For these reasons the alleged error in part of the instructions was not a prejudicial one, so as to necessitate a new trial, especially in view of the court's requirement for plaintiffs to consent to reduction of the judgment in the sum of $1,020.

The petitioner contends that the court's instructions placed the burden of proof upon the defendant, but we urge that this is not justified. As above stated, the court merely instructed the jury that *if* the carrier undertook to and did unload the cattle, then they should have done it in a proper and humane manner.

So, by plaintiff's requested instruction No. 11, the court advised that *if* you find for the plaintiff and *if* you find that the loss and injuries to the cattle were caused by negligence of the defendant you should award damages (R., 248).

Furthermore, by the giving of defendant's requested instructions Nos. 2, 4, 8, 10, 13, 15, 16, 19, 21, 22, and 25 the jury was instructed not to render verdict for plaintiff unless they found that the damage was due to the sole negligence of defendant and was not due to hard driving or feeding before loading, nor to the animals being too heavily loaded in the cars, nor to their being in poor shipping condition, nor to their being overheated before delivery to the defendant's carrier in Montana, nor to any act of contributory negligence on the part of plaintiffs or their agents.

And, finally, the jury was instructed, as requested in defendant's offered instruction No. 1, that "*the burden rests upon the plaintiffs to prove the essential elements of their complaint by a fair preponderance of the proofs, and that therefore in this case plaintiffs must establish by such preponderance of proof, not only that the defendant was negligent, but also that such negligence, if any, was the direct and proximate cause of plaintiff's damage, if any.*"

Surely these instructions do not place the burden of proof upon defendant, as argued here on his behalf, but instead protect carefully every right he had in the case. Some of the instructions, being based on partial defenses, although no partial defense was pleaded, should not have been given, in our opinion (McKin *vs.* Beiseker, 56 Mont., 330, 185 Pac., 153; Cornell *vs.* Great Northern R. Co., 57 Mont., 177; 187 Pac., 902); however, we made no objection to them, and hence defendant had the benefit of them. Everything considered, he has no just cause of complaint against any instruction in this case given to the jury (Moyse *vs.* Northern Pacific R. Co., 41 Mont., 272; 108 Pac., 1062).

Finally, the court's instructions on the burden of proof were in accordance with the ruling in that State, as laid down in the case of Nelson *vs.* Great Northern Ry. Co. (28 Mont., 297) and in the later case of Heitman *vs.* Chicago, Milwaukee & St. Paul R. Co. (45 Mont., 406).

We therefore maintain that no Federal question can be conjured out of the instructions to the jury or the refusal of instructions requested by petitioner or the rulings of the Supreme Court of Montana thereon. In this connection we refer to the recent opinion of this Court in Petrie *vs.* Nampa and M. Irrig. Dist. (248 U. S., 154) to the effect that "even if it be conceded that the supreme court decided a Federal question against the plaintiffs in error, nevertheless, the court decided against them also upon an independent ground, not involving any Federal question and broad enough to support the judgment, and for this reason the Federal question involved will not be considered on this writ of error, under a series of decisions by this Court, extending at least from Klinger *vs.* Missouri, 13 Wall., 257, 263, to Enterprise Irrig. Dist. *vs.* Farmers' Mut. Canal Co., 243 U. S., 157, 164."

We do not by this citation admit that there was any Federal question involved here.

Finally, we wish to answer briefly the contention of petitioner that the delays which have occurred in this case have been in any way our fault; this being evidently an attempt on their part to answer our contention as to the injustice which would be caused respondents by a removal of this cause to the Federal court for trial after all these years, and to our quotation of Mr. Justice Brewer's language in the Moore decision (*supra*). Certainly it is rather gratuitous for petitioner to urge that the respondents are responsible for the delays. At the time he commenced proceedings for the purpose of securing a writ of certiorari he should have been familiar with the numerous holdings of this Court and all the Federal courts that an appeal or writ of error could be taken only from a *final* decision. He should also have been familiar with the rulings of the Supreme Court of Montana to the effect that "an appeal from a judgment of the court below, entered in conformity to the judgment and order of the supreme court on a former appeal will be dismissed, as being in effect an appeal from the supreme court's own judgment" (Kimpton *vs.* Jubilee Placer Co., 22 Mont., 107). To the same effect are the rulings of the Federal courts (Stewart *vs.* Salamon, 97 U. S., 361) and other decisions cited in the Kimpton case (*supra*).

Petitioner also urges that we are partly responsible for the delays because we argued before the Supreme Court of Montana that the Lee and Investment Company cases should not be followed, but, as above set forth, the case had previously been tried at great expense under the decisions previously in force, and we were fully justified in arguing against a removal and retrial on the strength of later decisions, which decisions we believed were not controlling.

We respectfully contend that the petition sets up no good ground for the reversal of the decision below, and hence pray an affirmance thereof.

Respectfully submitted,

E. E. ENTERLINE,
SAMUEL HERRICK,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 138.—October Term, 1925.

Great Northern Railway Company, Petitioner, *vs.* Galbreath Cattle Company, et al.	**Writ of Certiorari to the Supreme Court of the State of Montana.**

[April 19, 1926.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action begun in a state court in Montana to recover for injuries to cattle shipped by railroad in interstate commerce.

In due time the defendant presented a verified petition, accompanied by a proper bond with good and sufficient surety, for the removal of the case into the federal district court for Montana; but the state court denied the petition, accorded the defendant an exception, and proceeded to the disposal of the case on the merits. After a trial it gave judgment for the plaintiffs, which the Supreme Court of the State affirmed after a part of the damages awarded was remitted. 66 Mont. 198; 71 Mont. 56; Montana Rev. Code, 1921, sec. 9748. The case is here on writ of certiorari.

One of the rulings assigned for error in the Supreme Court of the State was the denial of the petition for removal; but that court held that the case was not removable and sustained the ruling. It was to review the decision on this point that certiorari was granted.

The material allegations of the plaintiffs' complaint were to the following effect: One of the plaintiffs is a corporate citizen of Montana and the other is an individual citizen of Wyoming; while the defendant is a corporate citizen of Minnesota. The cattle were shipped from Cody, Wyoming, to Seville, Montana, on a through bill of lading over two connecting lines of railroad, the second being owned and operated by the defendant. The plaintiffs owned the cattle, were both consignors and consignees of the shipment and were the lawful holders of the bill of lading. The cattle were injured while in transit over the defendant's road by the defendant's action in unreasonably delaying and carelessly handling them and wrongfully omitting to unload them, when necessary, in a humane manner into properly equipped pens for rest, water and feeding—the resulting damages to the plaintiffs being upwards of $30,000.

The petition for removal, besides showing the presence of the requisite jurisdictional amount and the defendant's non-residence in the State where sued, asserted a right of removal on two grounds; first, that the case was one arising under the laws of the United States, particularly those applying to the shipment of cattle by railroad in interstate commerce; and, secondly, that the case was between citizens of different States.

If either ground was well taken the case was removable, Judicial Code, sec. 28; *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 261, 271, *et seq.*; *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U S. 653, and the state court erred in denying the petition and proceeding further with the case, Judicial Code, sec. 29; *New Orleans, Mobile and Texas R. R. Co.* v. *Mississippi*, 102 U. S. 135, 141; *National Steamship Company* v. *Tugman*, 106 U. S. 118, 122.

Whether the first ground was well taken is to be determined from the plaintiffs' statement in the complaint of their cause of action. According to that statement the cause of action was for injuries to cattle resulting from the defendant's negligent and wrongful non-performance of duties devolving on it as a second and connecting carrier while the cattle were being transported over its road on a through bill of lading—including the duty to unload them for needed rest, water and feeding. The bill of lading was issued under a law of Congress, Carmack Amendment, c. 3591, sec. 7, 34 Stat. 593, 595, and governed the entire transportation—that over the defendant's line as well as that over the line of the initial carrier, *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383, 387. And the carriers' duties in respect of unloading the cattle "in a humane manner into properly equipped pens for rest, water and feeding" were prescribed by a law of Congress, c. 3594, 34 Stat. 607. So it is apparent that the case stated in the complaint was one arising under the laws of the United States. *Cincinnati, etc., Ry. Co.* v. *Rankin*, 241 U. S. 319, 326; *St. Louis, etc., Ry. Co.* v. *Starbird*, 243 U. S. 592, 595; *Southern Pacific Co.* v. *Stewart*, 245 U. S. 359; *ibid.* 562; same case, 248 U. S. 446. And see *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 507.

It also is apparent from the complaint and the petition for removal that the case was one between citizens of different States in the sense of the statute defining the general jurisdiction of the federal district courts, Judicial Code, sec. 24. The words of that statute are, "shall have original jurisdiction . . . of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interests and costs, the sum or value of three thousand dollars, and . . . is between citizens of different States." This was such a case. The amount in controversy exceeded the requirement, and the plaintiffs were citizens of States other than the one of which the defendant was a citizen. *Sweeney* v. *Carter Oil Co.*, 199 U. S. 252, 256. And as the case was begun in a court of a state of which the defendant was a nonresident, it came plainly within the provision for the removal of cases on the ground of diverse citizenship, Judicial Code, sec. 28. In concluding otherwise the state courts conceived that they were following *Smith* v. *Lyon*, 133 U. S. 315, and *Camp* v. *Gress*, 250 U. S. 308. But they misapprehended the question involved in those cases. Both were begun in a federal court, and both were recognized as falling within the general jurisdiction of those courts. The question in each was one of venue—whether the case could be maintained in the court of a particular district against the defendant's objection. That question was answered in the negative. In *Camp* v. *Gress* the court was careful to point out the difference in purpose and operation between the statutory provision defining the general jurisdiction of the federal district courts and the provision dealing with venue. And in *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co., supra,* and *Lee* v. *Chesapeake & Ohio Ry. Co., supra,* this Court again pointed out that difference, and also that the venue provision respecting suits begun in those courts has no application to suits removed into them from state courts. The difference between the original removal statute of 1789, c. 29, sec. 12, 1 Stat. 79, to which the state courts gave some attention, and the present statute was shown in the last paragraph of the opinion in *Lee* v. *Chesapeake & Ohio Ry. Co., supra,* and does not call for further comment here.

We are of opinion that the state court of first instance should have given effect to the petition for removal and have declined to proceed further in the case and that the appellate court should have reversed the judgment with a direction that that be done.

Judgment reversed.